

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





75-7357,9

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**United States Court of Appeals**

FOR THE SECOND CIRCUIT

No. 75-7357

No. 75-7359

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THE HOME INSURANCE COMPANY,

*Plaintiff-Appellee,*

—against—

THE AETNA CASUALTY AND SURETY COMPANY  
and DIAMOND SHAMROCK CORPORATION,

*Defendants-Appellants.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**JOINT APPENDIX**

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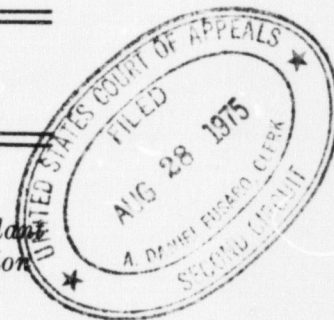
CADWALADER, WICKERSHAM & TAFT  
*Attorneys for Defendant-Appellant*  
*Diamond Shamrock Corporation*  
One Wall Street  
New York, New York 10005

J. ROBERT MORRIS  
*Attorney for Defendant-Appellant*  
*The Aetna Casualty and*  
*Surety Company*  
111 Fulton Street  
New York, New York 10038

TOWNLEY, UPDIKE, CARTER & RODGERS  
*Attorneys for Plaintiff-Appellee*  
220 East 42nd Street  
New York, New York 10017

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### Docket Entries

DATE	PROCEEDINGS
Sep. 24—74	Filed complaint and issued summons.
Oct. 10—74	Filed summons and Marshals return— served: The Aetna Casualty and Surety Co. by Mr. Dusinberre on 9-26-74 Sec. of State of the State of N. Y. by Bruce Stuart on 10-1-74
Oct. 30—74	Filed pltfs. affdt. and notice of motion for an order granting pltf. summary judgment pursuant to rule 56, etc. ret. on: Nov. 8, 1974.
Oct. 30—74	Filed pltfs. statement pursuant to rule 9(g).
Oct. 30—74	Filed pltfs. memorandum of law in support of motion for summary judgment.
Nov. 1—74	Filed Stipulation and order extending time of Deft. Aetna Casualty to 11/6/74— CARTER, J.
Nov. 6—74	Filed deft. Diamond Shamrock Corp.'s affdvt., statement under Rule 9(g) and notice of cross-motion for summary judgment.
Nov. 6—74	Filed deft. Diamond Shamrock Corp.'s memorandum of law in opposition to pltf's motion for summary judgment and in support of deft's cross-motion for summary judgment.

*Docket Entries*

DATE	PROCEEDINGS
Nov. 11—74	Filed stip. and order that pltf's motion and deft's cross-motion for summary judgment is adj. to 11-22-74 and that deft. Aetna shall serve and file its cross-motion and answering papers by 11-15-74 and pltf. to file reply papers, if any, by 11-21-74—Carter, J.
Nov. 11—74	Filed stip. and order that the time of deft. Diamond Shamrock Corp. to answer is adj. to 11-6-74—Carter, J.
Nov. 7—74	Filed ANSWER of deft. Aetna Casualty & Surety Co.
Nov. 6—74	Filed ANSWER of deft. Diamond Shamrock Corp.
Nov. 15—74	Filed deft. Aetna's affdvt. and cross-motion for summary judgment.
Nov. 15—74	Filed deft. Aetna's memorandum in opposition to pltf's motion for summary judgment and in support of deft's motion for summary judgment.
Nov. 21—74	Filed plaintiff's answering statement under Rule 9(g)
Nov. 21—74	Filed plaintiff's reply brief on its motion for summary judgment and answering brief on defendants' cross-motion.



*Docket Entries*

DATE	PROCEEDINGS
Nov. 21—74	Filed plaintiff and defendants joint submission re "Aetna Underlying Policy"
Dec. 12—74	Filed defendants' reply memorandum in support of the cross motions for summary judgment.
Dec. 16—74	Filed stip. and order that pltf. and deft. serve reply papers in re motions by 12-13-74.—Carter, J.
Apr. 24—75	Filed OPINION #42308 . . . in re motions by plaintiff and defendants cross-motions for summary judgment—defendants motions are denied, and plaintiff is entitled to summary judgment as indicated herein. So ordered.—Carter, J.
May 13—75	Filed JUDGMENT AND ORDER that the liability of plaintiff, The Home Insurance Co. under its policy of insurance NO. HEC 4165987 is as indicated herein. Plaintiff The Home Insurance Company shall recover of defendants Aetna Casualty & Surety Co. and Diamond Shamrock Corp. its costs of action.—Approved—Carter, J.—CLERK.
Jan. 11—75	Filed deft. Aetna Casualty and Surety Co. notice of appeal to the USCA from the judgment entered on May 13, 1975. (copies mailed)



*Docket Entries*

DATE	PROCEEDINGS
Jun. 11—75	Filed deft. Diamond Shamrock Corp. notice of appeal to the USCA from the final judgment entered on May 13, 1975. (copies mailed)
Jun. 11—75	Filed bond for undertaking of costs on appeal in the amount of \$250.00 (Aetna Casualty & Surety Co.)
Jun. 11—75	Filed bond for undertaking of costs on appeal in the amount of \$250.00 (Fireman's Fund)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
THE HOME INSURANCE COMPANY, :

Plaintiff, :

-against- :

THE AETNA CASUALTY and SURETY COMPANY :  
and DIAMOND SHAMROCK CORPORATION, :

Defendants. :

COMPLAINT

-----x  
Plaintiff, The Home Insurance Company, (hereinafter  
"Home"), by its attorneys, Townley, Updike, Carter & Rodgers,  
for its complaint, alleges:

1. Home is a New Hampshire corporation with its principal place of business in New York.
2. Defendant The Aetna Casualty and Surety Company (hereinafter "Aetna") is a Connecticut corporation with its principal place of business in Connecticut, and is licensed to do business in New York.
3. Defendant Diamond Shamrock Corporation (hereinafter "Diamond Shamrock") is a Delaware corporation with its principal place of business in Ohio, and is licensed to do business in New York.
4. This is a declaratory judgment action brought pursuant to 28 U.S.C.A. §§2201, 2202. Subject matter jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C.A. §1332. The amount in controversy, exclusive of interest and



costs, exceeds \$10,000.00.

5. At all relevant times, Diamond Shamrock was insured under the following policies of insurance:

(a) A comprehensive liability policy issued by Aetna (hereinafter the "Aetna Underlying Policy"),

(b) Policy #HEC4165987, issued by Home (hereinafter the "Home Excess Policy").

6. The Aetna Underlying Policy insured Diamond Shamrock against liability for damage to the property of others up to \$250,000 per occurrence, subject to a deductible of \$100,000 per occurrence and subject also to the following limitation:

"...as respects products liability for ... property damage coverage:

All such damage arising out of one lot of goods or products prepared or acquired by the named insured or by another trading under his name shall be considered as arising out of one occurrence."

7. The Home Excess Policy indemnified Diamond Shamrock for legal liability for property damage in excess of that covered by the Aetna Underlying Policy up to \$3,000,000 per occurrence, subject to the same limitation as to the meaning of the term "occurrence" appearing in the Aetna Underlying Policy.

8. During the period of coverage of the policies specified in Paragraph 5 of this complaint, Diamond Shamrock incurred products liability for property damage as a result of the following events:

(a) At its Harrison, New Jersey plant, Diamond Shamrock produced two defective lots of superconcentrated vitamin D-3 resin (hereinafter referred to as "the two Harrison lots").

(b) Diamond Shamrock shipped the two Harrison lots to its Louisville, Kentucky plant.

(c) At its Louisville, Kentucky plant, Diamond Shamrock further processed the two Harrison lots by grinding them to powder, blending them with oil, spraying the oil onto corn cobs and grinding the sprayed corn cobs into a powder to be sold under the trade name "Nopdex" as a vitamin D-3 livestock feed supplement. From the two Harrison lots, Diamond Shamrock thus manufactured four lots of Nopdex numbered 7356, 7436, 7466 and 7589 (hereinafter referred to as the "four Louisville lots"), each of which was defective.

(d) Diamond Shamrock sold the four Louisville lots of Nopdex to Central Soya Corporation which used them in making chicken feed.

(e) The chicken feed made by Central Soya from the four Louisville lots of Nopdex was defective because the four Louisville lots of Nopdex were defective.

(f) Central Soya sold the defective chicken feed to numerous chicken farmers throughout the country, who suffered property damage in that chickens fed with the



defective chicken feed developed various afflictions, including rickets, abnormal growth, defective egg production and/or death.

9. Central Soya has been and is presently settling claims of the aforesaid farmers. Diamond Shamrock has acknowledged its liability for these claims, and in its behalf Aetna is reimbursing Central Soya for their payment. All parties to this action have acquiesced in the determination of Diamond Shamrock's liability and in the settlement of the farmers' property damage claims.

10. A dispute has arisen between Home on the one hand and Aetna and Diamond Shamrock on the other as to the respective rights and obligations of the parties. It is the position of Home that the phrase "lot of goods or products" (see Paragraph 6 hereof) as used in the Aetna Underlying Policy refers to each of Diamond Shamrock's four Louisville lots of defective Nopdex and thus that Home's liability under The Home Excess Policy is to indemnify Diamond Shamrock, up to the limits of The Home Excess Policy, only for settlement contributions in excess of \$250,000 per Louisville lot of defective Nopdex. Aetna and Diamond Shamrock take the position that the above quoted phrase refers to each of the two Harrison lots and that Home is liable under The Home Excess Policy to indemnify Diamond Shamrock for settlement contributions in excess of \$250,000 per Harrison lot.

11. By reason of the foregoing, an actual controversy of a judicial nature exists between Home and defendants as to the

construction to be placed on the Aetna Underlying Policy and The Home Excess Policy.

WHEREFORE, Home demands judgment:

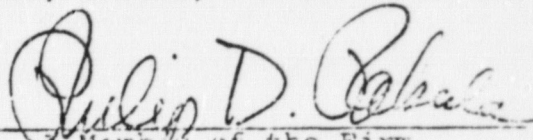
1. Declaring that its liability resulting from defects in Diamond Shamrock's Louisville lots of Nopdex numbered 7356, 7436, 7466 and 7589 is to indemnify Diamond Shamrock only for amounts Diamond Shamrock becomes legally obligated to pay in excess of \$250,000 for each such lot, but no more than \$3,000,000 for each such lot.

2. Granting it such other and further relief as may be just and proper in the circumstances, together with the costs and disbursements of this action.

Dated: New York, New York  
September 24, 1974

TOWNLEY, UPDIKE, CARTER & RODGERS

By



A Member of the Firm

Attorneys for Plaintiff

The Home Insurance Company

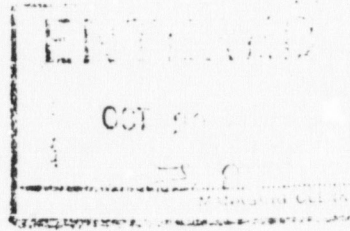
220 East 42nd Street

New York, New York 10017

(212) 682-4567



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
THE HOME INSURANCE COMPANY, :

Plaintiff, :

Index No. 74 Civ. 4164 (RLC)

-against- :

NOTICE OF MOTION

THE AETNA CASUALTY and SURETY :  
COMPANY and DIAMOND SHAMROCK :  
CORPORATION, :

Defendants. :

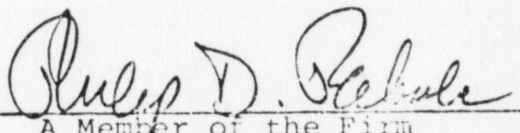
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PLEASE TAKE NOTICE that on the annexed affidavit of Robert H. Burns sworn to October 21, 1974, the annexed statement pursuant to General Rule 9(g) of the Rules of this Court, the undersigned, on behalf of plaintiff, The Home Insurance Company, will move this Court on November 8, 1974, at 10 a.m. on that day at the Courthouse, located at Foley Square, New York, New York, before District Judge Robert L. Carter, for an order pursuant to FRCP 56 granting plaintiff summary judgment on the grounds that there is no genuine issue as to any material fact with respect to the sole question before this Court: Were there two "occurrences" or four "occurrences" within the meaning of the applicable insurance policies.

PLEASE TAKE FURTHER NOTICE that oral argument is requested, and that pursuant to General Rule 9 of the Rules of this Court, answering papers, if any, should be served on the undersigned no later than noon on November 5, 1974.

Dated: New York, New York  
October 28, 1974

TOWNLEY, UPDIKE, CARTER & RODGERS

By   
A Member of the Firm  
Attorneys for Plaintiff  
The Home Insurance Company  
220 East 42nd Street  
New York, New York 10017  
(212) 682-4567

TO: -

Cadwalader, Wickersham & Taft  
Attorneys for Defendant  
Diamond Shamrock Corporation  
One Wall Street  
New York, New York 10005

J. Robert Morris, Esq.  
Attorney for Defendant  
The Aetna Casualty &  
Surety Company  
111 Fulton Street  
New York, New York 10038



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

THE HOME INSURANCE COMPANY,	:	
	:	Index No. 74 Civ. 4164
Plaintiff,	:	(RLC)
-against-	:	
	:	AFFIDAVIT OF ROBERT H.
THE AETNA CASUALTY and SURETY COMPANY	:	<u>BURNS</u>
and DIAMOND SHAMROCK CORPORATION,	:	
	:	
Defendants.	:	
	:	
	:	

-----X

State of New York    )  
                              :    ss.:  
County of New York    )

ROBERT H. BURNS, being duly sworn, deposes and says:

1. I am a supervisor in the Excess Claims Division of plaintiff The Home Insurance Company ("Home"). I am familiar with the facts stated herein. This affidavit is based upon my personal knowledge and upon Home's records and reports prepared in the ordinary course of business. I believe there are no relevant facts in dispute. I make this affidavit in support of Home's motion for summary judgment pursuant to FRCP 56 to resolve the sole question before this Court: Were there two "occurrences" or four "occurrences" within the meaning of the insurance policies discussed below.

2. At all relevant times, Diamond Shamrock was insured under the following policies of insurance:

(a) A comprehensive liability policy issued by Aetna (the "Aetna Underlying Policy").

(b) Policy #HEC 4165987, issued by Home (the "Home Excess Policy").

Copies of both policies will be handed up at the argument or submission of this motion.

3. The Aetna Underlying Policy insured Diamond Shamrock against liability for damage to the property of others "caused by an occurrence" up to \$250,000 per occurrence, subject to a deductible of \$100,000 per occurrence. The number of occurrences is dependant upon two key provisions of the Aetna Underlying Policy. The first is the standard definition of the word occurrence:

"'occurrence' means an accident including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"

The second is Endorsement No. 33:

" ... AS RESPECTS PRODUCTS LIABILITY FOR BODILY INJURY AND PROPERTY DAMAGE COVERAGE:

ALL SUCH DAMAGE ARISING OUT OF ONE LOT OF GOODS OR PRODUCTS PREPARED OR ACQUIRED BY THE NAMED INSURED OR BY ANOTHER TRADING UNDER HIS NAME SHALL BE CONSIDERED AS ARISING OUT OF ONE OCCURRENCE."

4. The Home Excess Policy indemnified Diamond Shamrock for legal liability for property damage in excess of that covered by the Aetna Underlying Policy up to \$3,000,000 per occurrence, subject to the same provisions as to the meaning of occurrence as in the Aetna Underlying Policy.



5. During the period of coverage of the policies specified in Paragraph 5 of this complaint, Diamond Shamrock incurred products liability for property damage as a result of the following events:

(a) At its Harrison, New Jersey plant, Diamond Shamrock produced two defective lots of superconcentrated vitamin D-3 resin (hereinafter referred to as "the two Harrison lots").

(b) Diamond Shamrock shipped the two Harrison lots to its Louisville, Kentucky plant.

(c) At its Louisville, Kentucky plant, Diamond Shamrock further processed the two Harrison lots by grinding them to powder, blending them with oil, spraying the oil onto corn cobs and grinding the sprayed corn cobs into a powder to be sold under the trade name "Nopdex" as a vitamin D-3 livestock food supplement. From the two Harrison lots, Diamond Shamrock thus manufactured four lots of Nopdex numbered 7356, 7436, 7466 and 7589 (hereinafter referred to as the "four Louisville lots"), each of which was defective.

(d) Diamond Shamrock sold the four Louisville lots of Nopdex to Central Soya Corporation which used them in making chicken feed.

(e) The chicken feed made by Central Soya from the four Louisville lots of Nopdex was defective because the four Louisville lots of Nopdex were defective.

(f) Central Soya sold the defective chicken feed to numerous chicken farmers throughout the country, who suffered property damage in that chickens fed with the defective chicken feed developed various afflictions, including rickets, abnormal growth, defective egg production and/or death.

6. Central Soya has been and is presently settling claims of the aforesaid farmers. Diamond Shamrock has accepted its liability for these claims and in its behalf Aetna and Home have been reimbursing Central Soya to the extent such reimbursement is consistent with the conflicting positions taken by each, as described below. All parties to this action have acquiesced to the settlements of the farmers' property damage claims by Central Soya and to Diamond Shamrock's liability to Central Soya for those claims.

7. A dispute has arisen between Home on the one hand and Aetna and Diamond Shamrock on the other as to the number of occurrences arising out of the facts of this action. It is the position of Home that there were four occurrences, one for each of the four Louisville lots of Nopdex, and thus that Home's liability under the Home Excess Policy is to indemnify Diamond Shamrock, up to the limits of the Home Excess Policy, only for settlement contributions in excess of \$250,000 per Louisville lot. Aetna and Diamond Shamrock take the position that there were two occurrences, one for each of the two Harrison lots of superconcentrated vitamin D-3 resin. In their view, Home is



liable under the Home Excess Policy to indemnify Diamond Shamrock for settlement contributions in excess of \$250,000 per Harrison lot.

8. Obviously, the question before the Court is whether the phrase "one lot of goods or products prepared ... by the named insured" as used in Endorsement No. 33 means one of the four lots of Nopdex Diamond Shamrock manufactured in Louisville and sold to Central Soya or one of the two lots of the intermediate lots of resin Diamond Shamrock made at its Harrison plant to be further processed into Nopdex. The policy contains two definitions and three exclusions that should be considered by the Court in answering that question. The definitions are:

- "named insured's products means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but named insured's products shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;"

\* \* \*

"products hazard includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;"

The pertinent exclusions provide that:

"This insurance does not apply:

\* \* \*

(m) to loss of use of tangible property which has not been physically injured or destroyed resulting from

- (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or
- (2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured;

(n) to property damage to the named insured's products arising out of such products or any part of such products;

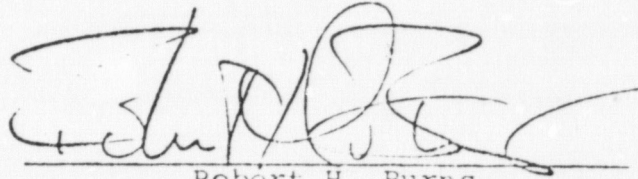
\* \* \*

(p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein;"

9. Home's position, more fully articulated in its memorandum of law is that in or out of context the phrase "lot of goods or products prepared... by the named insured" can only refer to the four Louisville lots of Nopdex made and sold by

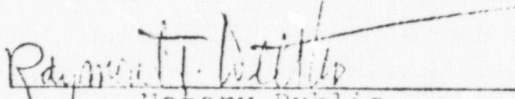


Diamond Shamrock and cannot refer to the two lots of intermediate resin made at Harrison for further processing by Diamond Shamrock before sale. I urge that Home's motion for summary judgment be granted.

  
Robert H. Burns

Sworn to before me this

21<sup>st</sup> day of October, 1974.

  
Notary Public

RAYMOND F. WELLINGTON  
NOTARY PUBLIC, State of New York  
No. 00-6603250  
Qualified in Nassau County  
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
THE HOME INSURANCE COMPANY, :

Plaintiff, :

-against- :

THE AETNA CASUALTY and SURETY COMPANY :  
and DIAMOND SHAMROCK CORPORATION, :

Defendants. :

STATEMENT PURSUANT  
TO GENERAL RULE 9(g)

-----X  
Pursuant to Rule 9(g) of the General Rules of this Court, plaintiff contends that the following are the material facts as to which there is no genuine issue to be tried:

1. At all relevant times, Diamond Shamrock was insured under the following policies of insurance:

(a) A comprehensive liability policy issued by Aetna (the "Aetna Underlying Policy").

(b) Policy #HEC 4165987, issued by Home (the "Home Excess Policy").

2. The Aetna Underlying Policy insured Diamond Shamrock against liability for damage to the property of others up to \$250,000 per occurrence, subject to a deductible of \$100,000 per occurrence. It contains, inter alia, the following provisions:



"'occurrence' means an accident including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"

\* \* \*

" ... AS RESPECTS PRODUCTS LIABILITY FOR BODILY INJURY AND PROPERTY DAMAGE COVERAGE:

ALL SUCH DAMAGE ARISING OUT OF ONE LOT OF GOODS OR PRODUCTS PREPARED OR ACQUIRED BY THE NAMED INSURED OR BY ANOTHER TRADING UNDER HIS NAME SHALL BE CONSIDERED AS ARISING OUT OF ONE OCCURRENCE."

\* \* \*

"named insured's products means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but named insured's products shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;"

\* \* \*

"products hazard includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;"

\* \* \*

"This insurance does not apply:

\* \* \*

(m) to loss of use of tangible property which has not been physically injured or destroyed resulting from

(1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or

(2) the failure of the named insured's products

or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured;

- (n) to property damage to the named insured's products arising out of such products or any part of such products;

\* \* \*

- (p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein;"

3. The Home Excess Policy indemnified Diamond Shamrock for legal liability for property damage in excess of \$250,000 per occurrence up to \$3,000,000 per occurrence, subject to the same provisions as to the meaning of "occurrence" as in the Aetna Underlying Policy.

4. During the period of coverage of the policies specified in Paragraph 1 of this statement, Diamond Shamrock incurred products liability for property damage as a result of the following events:

- (a) At its Harrison, New Jersey plant, Diamond



Shamrock produced two defective lots of superconcentrated vitamin D-3 resin (hereinafter referred to as "the two Harrison lots").

(b) Diamond Shamrock shipped the two Harrison lots to its Louisville, Kentucky plant.

(c) At its Louisville, Kentucky plant, Diamond Shamrock further processed the two Harrison lots by grinding them to powder, blending them with oil, spraying the oil onto corn cobs and grinding the sprayed corn cobs into a powder to be sold under the trade name "Nopdex" as a vitamin D-3 livestock food supplement. From the two Harrison lots, Diamond Shamrock thus manufactured four lots of Nopdex numbered 7356, 7436, 7466 and 7589 (hereinafter referred to as the "four Louisville lots"), each of which was defective.

(d) Diamond Shamrock sold the four Louisville lots of Nopdex to Central Soya Corporation which used them in making chicken feed.

(e) The chicken feed made by Central Soya from the four Louisville lots of Nopdex was defective because the four Louisville lots of Nopdex were defective.

(f) Central Soya sold the defective chicken feed to numerous chicken farmers throughout the country, who suffered property damage in that chickens fed with the defective chicken feed developed various afflictions, including rickets; abnormal growth, defective egg production and/or death.

5. Central Soya has been and is presently settling claims of the aforesaid farmers. Diamond Shamrock has accepted its liability for these claims and in its behalf Aetna and Home are reimbursing Central Soya for that portion of their payment for which each admits coverage by its policy. All parties to this action have acquiesced in the settlements of the farmers' property damage claims by Central Soya and in Diamond Shamrock's liability to Central Soya for those claims.

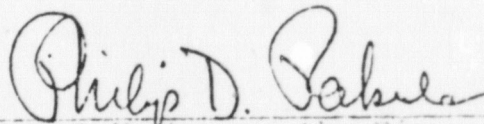
6. Home contends that there were four "occurrences" within the meaning of the Aetna Underlying Policy. Aetna and Diamond Shamrock contend there were two.

7. This Court has jurisdiction over the subject matter and the parties.

8. An actual controversy exists among the parties.

TOWNLEY, UPDIKE, CARTER & RODGERS

By



A Member of the Firm

Attorneys for Plaintiff  
The Home Insurance Company  
220 East 42nd Street  
New York, New York 10017  
(212) 682-4567



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

THE HOME INSURANCE COMPANY, : 74 Civ. 4164 (RLC)

Plaintiff, :

-against- : CROSS MOTION FOR

THE AETNA CASUALTY and SURETY : SUMMARY JUDGMENT

COMPANY and DIAMOND SHAMROCK :

CORPORATION, :

Defendants. :

----- x

On all the pleadings and on the annexed affidavits and Statement pursuant to Rule 9(g) of the General Rules of this Court, defendant Diamond Shamrock Corporation by its attorneys moves the Court pursuant to Rule 56, F.R.C.P., to enter summary judgment for Diamond Shamrock Corporation in accordance with the prayer for relief in the Answer of said defendant on the grounds that there is no genuine issue as to any material fact and that Diamond Shamrock Corporation is entitled to a judgment as a matter of law.

Dated: November 5, 1974  
New York, New York

CADWALADER, WICKERSHAM & TAFT

By: A. Neil Doster

A Member of the Firm

Attorneys for Diamond Shamrock Corporation

One Wall Street  
New York, New York 10005  
(212) 785-1000

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

THE HOME INSURANCE COMPANY, : 74 Civ. 4164 (RLC)

Plaintiff, :

-against-

: STATEMENT PURSUANT  
TO GENERAL RULE 9(f)

THE AETNA CASUALTY and SURETY :  
COMPANY and DIAMOND SHAMROCK :  
CORPORATION, :

Defendants. :

- - - - - x

Defendant Diamond Shamrock Corporation makes this Statement pursuant to Rule 9(g) of the General Rules of this Court. In opposition to plaintiff's motion for summary judgment, Diamond Shamrock does not contend that there exists a genuine issue to be tried as to any material fact, but opposes such motion as a matter of law.

In support of its cross-motion for summary judgment, Diamond Shamrock contends that the following are the material facts as to which there is no genuine issue to be tried:

1. All the facts stated in plaintiff's Rule 9(g) Statement, except that portion of paragraph 4(c) thereof stating that "grinding" and "blending with oil" occurred at the Louisville plant. The two Harrison lots consisted of



superconcentrated Vitamin D-3 resin melted and mixed into corn oil at the Harrison plant before shipment to the Louisville plant and no grinding or blending with oil occurred at the Louisville plant.

2. The four Louisville lots were defective solely because of the accident which occurred at the Harrison plant in the production of each of the two Harrison lots.

3. Pursuant to the Aetna Underlying Policy, Central Soya Corporation has been reimbursed \$500,000 for the payments made by it in settlement of farmers' claims. Diamond Shamrock has reimbursed and is reimbursing Central Soya for its payments in excess of said \$500,000 for the settlement of farmers' claims. Aetna is processing the settlement of those claims in excess of said \$500,000 at the expense of Diamond Shamrock.

4. Diamond Shamrock has submitted written notice upon The Home Insurance Company of its claims for reimbursement under the Home Excess Policy and Home has refused to pay such claims except to the limited extent consistent with Home's position as set forth in paragraph 10 of the complaint.

5. The purpose and intent behind inclusion of the "batch" clause in Diamond Shamrock's policy was to limit

the amount of loss incurred by the insured, consistent with the concept of an "occurrence", so that there would be one occurrence for each batch or lot with respect to which an accident occurred.

6. The customary understanding and usage in the insurance industry is that once a batch or lot has separate integrity and an administrative number for accounting and production purposes, there is a lot within the meaning of the batch clause. The accident or "occurrence" was in Harrison and two administrative batch numbers can be correlated to the accident that occurred in Harrison.

7. Superconcentrated Vitamin D-3 resin is sold after melting by Diamond Shamrock to customers. Sometimes the resin is mixed with corn oil and then sold to customers. The resin, after melting and mixing with corn oil, is also shipped by Diamond Shamrock to premix plants for production of dry Vitamin D-3 concentrates.

Dated: November 5, 1974  
New York, New York

CADWALADER, WICKERSHAM & TAFT

By: 

A Member of the Firm

Attorneys for Defendant Diamond  
Shamrock Corporation  
One Wall Street  
New York, New York 10005  
(212) 785-1000



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
THE HOME INSURANCE COMPANY,	:	
	:	
Plaintiff,	:	Index No. 74 Civ. 4164
- against -	:	(RLC)
	:	
THE AETNA CASUALTY and SURETY	:	AFFIDAVIT OF CHARLES M.
COMPANY and DIAMOND SHAMROCK	:	<u>ELY</u>
CORPORATION,	:	
	:	
Defendants.	:	
-----X	:	

State of New York )  
: ss.:  
County of New York)

CHARLES M. ELY, being duly sworn, deposes and says:

1. I am Manager of Agricultural Research and Technical Services for the Nutrition and Animal Health Division of Diamond Shamrock Corporation. I have held that and similar positions for the past 23 years, first with Nopco Chemical Company which merged with Diamond Shamrock in 1967. I hold a Bachelor of Science degree in Agricultural Bio Chemistry and Animal Nutrition from Penn State University. My function is twofold - the research and development of new products and the handling of customer complaints on certain products of the Nutrition and Animal Health Division.

2. This affidavit is based upon my personal knowledge and upon records of the company and reports prepared in the ordinary course of business.

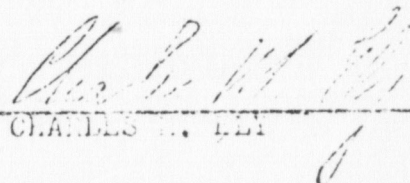
3. I am familiar with the production of superconcentrated Vitamin D3 resin in our Harrison plant. The resin is melted to form a blend and is sometimes sold by Diamond Shamrock in that

form to customers. Sometimes the resin, after melting to form a blend, is then mixed in corn oil and sold to customers. Resin, after melting and mixing with corn oil at the Harrison plant, is also shipped to our vitamin premix plants at Louisville, Kentucky, Van Buren, Arkansas, and Fresno, California, for the production of dry Vitamin D3 concentrates.

4. When the Vitamin D3 mixed with corn oil is shipped from our Harrison plant to our premix plants, the oil blend is sprayed on to corn cob carriers to make NOPDEX "200". No grinding or oil blending occurs at any of the premix plants in making NOPDEX "200".


5. As Manager of Technical Services, I am responsible for initiating any investigation of and answering any complaints received by Diamond Shamrock with regard to the products of the Nutritional and Animal Health Division, including Vitamin D3 and NOPDEX "200". In that capacity, I created a task force to investigate certain complaints received by the company from Central Soya Corporation in early 1974.

6. As a result of our extensive investigation, it was determined that an accident occurred in the melting and blending of specific lots of superconcentrated Vitamin D3 at the Harrison plant prior to shipment to the Louisville plant.

  
 CHARLES H. LEE

Sworn to before me this

31<sup>st</sup> day of October, 1974.

  
 Notary Public

FERNAND ACKERMAN  
 Notary Public New York  
 Commission Expires 03.19.76



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X		
THE HOME INSURANCE COMPANY,	:	
	:	
Plaintiff,	:	Index No. 74 Civ. 4164
	:	(RLC)
- against -	:	
	:	AFFIDAVIT OF F. GORDON
THE ALINA CASUALTY and SURETY	:	STEWART
COMPANY and DIAMOND SHAMROCK	:	
CORPORATION,	:	
	:	
Defendants,	:	
-----X		

State of New York )  
                              : ss.:  
County of New York)


F. GORDON STEWARD, being duly sworn, deposes and says:

1. I am Production Manager for Nutrition and Animal Health Products at Diamond Shamrock Corporation's Harrison, New Jersey plant. I hold the degree of Bachelor of Chemical Engineering from Cornell University and I have been employed by Diamond Shamrock for over 13 years in research, technical and production capacities. I have worked for the last 4-1/2 years at the Harrison plant. This affidavit is based upon my personal knowledge and upon records of the company prepared in the ordinary course of business.

2. At the Harrison plant, among other things I am responsible for the manufacture of Vitamin D3. In the course of the manufacturing operations, two lots of superconcentrated Vitamin D3 (lot numbers C 498 and C 500) were made and melted at the Harrison plant. The blended superconcentrated Vitamin D3 was subsequently mixed with corn oil and antioxidants and shipped to our Louisville

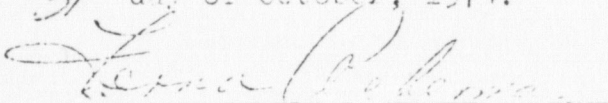
plant.

3. Subsequent to the manufacture of these two lots, complaints received by the company from Central Soya Corporation led to an investigation regarding the quality of the two Harrison lots (C 498 and C 500). I participated in this investigation as a member of the task force. This investigation established that lots (C 498 and C 500) became inactive as a result of an accident which occurred during melting and blending at the Harrison plant and prior to the mixing with corn oil and the shipment to the Louisville plant.

  
F. Gordon Steward

Sworn to before me this

31<sup>st</sup> day of October, 1974.

  
Notary Public

FERNA ACKERMAN  
Notary Public, State of New York  
Exp. 21-01-1976  
Qualified in New York County  
Commission Expires March 20, 1976



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

THE HOME INSURANCE COMPANY,	:	
	:	
Plaintiff,	:	Index No. 74 Civ. 4164
	:	(RLC)
- against-	:	
	:	
THE AETNA CASUALTY and SURETY	:	AFFIDAVIT OF MARVIN T.
COMPANY and DIAMOND SHAMROCK	:	<u>GRIEDER</u>
CORPORATION,	:	
	:	
Defendants,	:	

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State of New York )  
                              : ss.:  
Cour. of New York)

MARVIN T. GRIEDER, being duly sworn, deposes and says:

1. I am Products Manager of Feed Supplements in the Nutrition and Animal Health Division of Diamond Shamrock Corporation, Newark, New Jersey. I have been with the company 17 years. I hold a Bachelor of Science degree in Agriculture from the University of Georgia. This affidavit is based upon my personal knowledge and upon records of the company prepared in the ordinary course of business.

2. From 1961 through August of 1974, I was employed at Diamond Shamrock's Louisville, Kentucky plant as Production Planner and Formulator. I served in that capacity during the period of time when the two Harrison lots in question were received at the Louisville plant and used in the conversion of Vitamin D3 in corn oil into dry Vitamin D3 concentrate, NOFDEX "200".

3. The operation at the Louisville plant consists of spraying the Vitamin D3 in corn oil onto corn cob fractions. In making NOPDEX "200", no grinding or blending with oil occurs at the Louisville plant.

4. In early 1974 complaints were received from Central Soya Corporation with respect to four lots of NOPDEX "200" produced at the Louisville plant and purchased by Central Soya Corporation.

5. I was involved in the company's investigation of such complaints to the extent of reporting the procedures followed in the Louisville plant and making available all of the invoices and other records associated with the Louisville plant's handling of the two Harrison lots. I have been advised that no accident occurred at the Louisville plant.

*Harvin T. Grieder*  
 HARVIN T. GRIEDER

Sworn to before me this

31<sup>st</sup> day of October, 1974

*Herma Ackerman*  
 Notary Public

FERMA ACKERMAN  
 Notary Public, State of New York  
 No. 3150127  
 Qualified in New York County  
 Commission Expires March 30, 1976



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

THE HOME INSURANCE COMPANY,	:	Index No. 74 Civ. 4164
	:	(RLC)
Plaintiff,	:	
--against--	:	AFFIDAVIT OF
	:	<u>WILLIAM R. GREENING</u>
THE AETNA CASUALTY and SURETY	:	
COMPANY and DIAMOND SHAMROCK	:	
CORPORATION,	:	
Defendants.	:	

----- x

STATE OF NEW YORK )  
                              : ss.:  
COUNTY OF NEW YORK )

WILLIAM R. GREENING, being duly sworn, deposes and says:

1. I am an Assistant Vice President of Alexander & Alexander, Inc., 1185 Avenue of the Americas, New York, New York, insurance brokers for the defendant Diamond Shamrock Corporation. I have been employed by Alexander & Alexander, Inc. for the last 11 years. Since August 1966, I have been responsible for the renewal negotiation and servicing of the casualty insurance program for Diamond Shamrock.

2. In November of 1966, the National Bureau of Casualty Underwriters adopted and recommended industry usage of a revised general liability policy which, among other things,

eliminated the so-called "batch" clause. The definition thereby eliminated generally read as follows:

"It is agreed that Item III limits of liability under the CGL part is amended to include the following as respects products liability for bodily injury and property damage coverage: 'All such damage arising out of one lot of goods or products prepared or acquired by the named insured or by another trading under his name shall be considered as arising out of one occurrence.'"

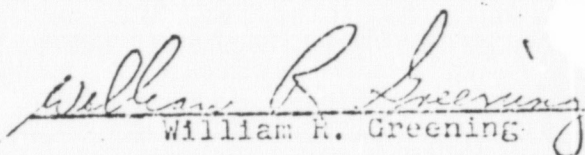
3. The reason for the elimination of this clause by the National Bureau was that it was generally understood that the new definition of "occurrence" which included the phrase "continuous or repeated exposure to conditions" had the same effect as the "batch" clause.

4. Diamond Shamrock's general liability contract was negotiated in February, 1966 for a term expiring in February, 1969 and included the batch wording quoted above in paragraph 2. On or about the renewal date, February 1, 1969, Alexander & Alexander, as the insured's broker, approached several prospective insurers with specifications, including the same batch wording requirement as part of these specifications.

5. The Aetna Casualty and Surety Company, one of the insurers we approached, has maintained the Diamond Shamrock policy for at least the last 15 years. Our purpose in requesting the continuation of the "batch" clause in the new policy, despite the National Bureau's 1966 redefinition and revisions described above, was to clarify the intent to limit the amount of loss

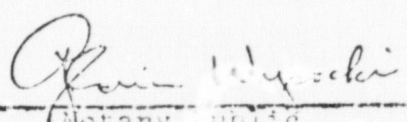


incurred by the insured, consistent with the concept of an occurrence, since Diamond Shamrock was on a cost plus basis providing for reimbursement to the carrier by the insured up to a certain limit of loss in the primary casualty contract. Aetna and Alexander & Alexander agreed to renewal of the policy in February 1969 with inclusion of the "batch" clause, so that there would be one occurrence for each batch or lot with respect to which an accident occurred. I have since included the batch clause in each casualty renewal for Diamond Shamrock up to the present date.

  
William R. Greening

Sworn to before me this

5 day of November, 1974.

  
Notary Public

GLORIA WYSOCKI  
Notary Public, State of New York  
No. 41-9759535 - Queens County  
Certificate filed in New York County  
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

THE HOME INSURANCE COMPANY,	:	Index No. 74 Civ. 4164 (RLC)
Plaintiff,	:	
-against-	:	AFFIDAVIT OF
	:	<u>MICHAEL COLLINS</u>
THE AETNA CASUALTY and SURETY	:	
COMPANY and DIAMOND SHAMROCK	:	
CORPORATION,	:	
Defendants.	:	

----- x

STATE OF NEW YORK )  
                          : ss.:  
COUNTY OF NEW YORK )

MICHAEL COLLINS, being duly sworn, deposes and says:

1. I am an Assistant Vice President of Alexander & Alexander, 1185 Avenue of the Americas, New York, New York, insurance brokers for defendant Diamond Shamrock Corporation. I have been employed at Alexander & Alexander as casualty claims manager for three years. Prior to that, I was employed for eight years by the Insurance Company of North America in the capacity of claims adjuster, claims examiner and claims supervisor.

2. I have handled a number of claims to which the "batch" clause applied and have frequently been required to



participate in interpreting the meaning of "batch" clauses in various product liability claims.

3. I have read the papers submitted on behalf of The Home Insurance Company, including the affidavit of Mr. Robert H. Burns, dated October 21, 1974, submitted in support of the plaintiff's motion for summary judgment. However, based upon the various clauses and definitions of the underlying policies involved and the facts which generally are not in dispute, I disagree with the conclusions stated by Mr. Burns in paragraph 9 of his affidavit. Mr. Burns' interpretation of the "batch" clause is inconsistent with the generally accepted understanding and customary usage of such a clause in the insurance industry.

4. The customary understanding and usage in the industry is that once a batch or lot has separate integrity and an administrative number for accounting and production purposes, there is a lot within the meaning of the batch clause. The number of batches or lots that is relevant in determining the number of "occurrences" is the number identifiable at the stage where the "accident" occurred. The first stage when (a) the product is divided into identifiable batches and (b) an accident occurs or has occurred is the stage relevant to application of the batch clause.

5. The undisputed facts of this case, as stated by Mr. Burns, are that an accident took place at the Harrison plant,

involving two batches (Burns Affidavit, ¶5(a)). Admittedly, therefore, the occurrence or accident involved two identifiable batches or lots. In my experience, it is unreasonable to apply the batch clause by counting the number of lots into which the affected lots may be subsequently divided after the accident occurred. Yet this is precisely the interpretation Mr. Burns asserts.

6. If the investigation in this case had revealed that an accident took place after the two Harrison lots left the Harrison plant of Diamond Shamrock, there might well indeed have been additional "occurrences" in accordance with the generally accepted interpretation of a batch clause. Had the occurrence been in Louisville, there might well have been additional batches under the terms of the batch clause. But these are not the facts in this case. The occurrence was in Harrison and an administrative batch number can be correlated to the accident that occurred in Harrison. To adopt the interpretation advanced by Mr. Burns in this case would have the result of negating the intent of the batch clause, which is to keep to a minimum the number of batches associated with each occurrence or accident.

*Michael Collins*

Michael Collins

Sworn to before me this

4<sup>th</sup> day of November, 1974

*Ferna Ackerman*

Notary Public

FERNA ACKERMAN  
Notary Public, State of New York  
No. 315012200  
Qualified in New York County  
Comm. Exp. March 30, 1976



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

THE HOME INSURANCE COMPANY,	:	74 Civ. 4164 (RLC)
Plaintiff,	:	
-against-	:	ANSWER
THE AETNA CASUALTY and SURETY	:	
COMPANY and DIAMOND SHAMROCK	:	
CORPORATION,	:	
Defendants.	:	

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Defendant, DIAMOND SHAMROCK CORPORATION ("Diamond Shamrock"), by its attorneys, Cadwalader, Wickersham & Taft, for its answer to the complaint herein, states as follows:

1. Admits the allegations of paragraphs 1, 2, 3, 4 and 5.

2. Admits the allegations of paragraph 6 and further alleges that the term "occurrence" is defined in the Aetna Underlying Policy as follows:

"'occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;"

3. Admits the allegations of paragraph 7, except avers and alleges that the Home Excess Policy indemnifies Diamond Shamrock for its "Ultimate Net Loss" for property damage in excess of that covered by the Aetna Underlying Policy up to \$3,000,000 per occurrence subject to the same definition and limitation of the meaning of the term "occurrence" appearing in the Aetna Underlying Policy, and the Home Excess Policy defines the "Ultimate Net Loss" as follows:

"(1) The total sum which the Assured, or any Company as his Insurer, become obligated to pay by reason of personal injury or injury to or destruction of property, including the loss of use thereof, either through adjudication or compromise, and

(11) shall also include hospital, medical and funeral charges, and all sums paid as salaries, wages, compensation, fees, charges, and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Named Assured's, or of any underlying Insurer's permanent employees,

(Hereinafter referred to as 'Expenses')."

4. Admits the allegations of paragraph 8, except avers and alleges with respect to subparagraphs (a) and (b) thereof that each of the two Harrison lots produced at Diamond Shamrock's Harrison, New Jersey plant consisted of superconcentrated vitamin D-3 resin melted and mixed into corn oil and was shipped to Diamond Shamrock's Louisville, Kentucky plant; denies with respect to subparagraph (c) thereof that Diamond Shamrock further processed the two Harrison lots "by grinding them to powder, blending them with oil" at its Louisville, Kentucky plant; and avers and alleges that the four Louisville lots were defective solely because of the accident which occurred in the production of each of the two Harrison lots.

5. Admits the allegations of paragraph 9, except avers and alleges that pursuant to the Aetna Underlying Policy Central Soya has been reimbursed \$500,000 for payments made by it in settlement of farmers' claims, that Diamond Shamrock has reimbursed and is reimbursing Central Soya for its payments in excess of said \$500,000 for the settlement of farmers' claims, and that Aetna is processing



the settlement of those claims in excess of said \$500,000 at the expense of Diamond Shamrock.

6. Admits the allegations of paragraphs 10 and 11, and avers and alleges that Diamond Shamrock has submitted written notice upon Home of its claims for reimbursement under the Home Excess Policy and Home has refused to pay such claims except to the limited extent consistent with Home's position as set forth in paragraph 10 of the complaint.

WHEREFORE, Diamond Shamrock Corporation demands judgment:

1. Declaring that Home is liable to it for all damages arising out of the two Harrison lots in excess of \$250,000 but not in excess of \$3,000,000 per lot, and for interest on the sums paid by it to Central Soya in connection with the settlement of farmers' claims in excess of \$500,000 and its expenses in connection with the settlement of those claims.
2. Granting it costs and expenses in this action, including counsel fees and disbursements, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
November 5, 1974

CADWALADER, WICKERSHAM & TAFT

By: 

A Member of the Firm  
Attorneys for Defendant  
Diamond Shamrock Corporation  
One Wall Street  
New York, New York 10005  
(212) 785-1000

TO: Townley, Updike, Carter & Rodgers  
Attorneys for Plaintiff  
The Home Insurance Company  
220 East 42nd Street  
New York, New York 10017

J. Robert Morris, Esq.  
Attorney for Defendant  
The Aetna Casualty & Surety Company  
111 Fulton Street  
New York, New York 10038



UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

THE HOME INSURANCE COMPANY

Plaintiff,

-against-

74 CIV. 4164  
(RLC)

THE Aetna CASUALTY AND SURETY COMPANY and  
DIAMOND SERRAOCK CORPORATION

ANSWER

Defendants.

----- x

The defendant, Aetna CASUALTY & SURETY COMPANY, answering the complaint of the plaintiff herein, upon information and belief:

FIRST: Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the complaint designated "1," "3," and "7."

SECOND: Admits the allegations of paragraph "6" and further alleges that the term "occurrence" is defined in the Aetna Underlying Policy as follows:

"'occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;"

THIRD: Denies the allegations contained in the paragraph of the complaint designated "8," except admits that the two Harrison lots were involved in this dispute.

FOURTH: Admits the allegations of paragraph "9" except alleges that pursuant to the Aetna Underlying Policy, Central Soya has been reimbursed \$500,000 for payments made by it in settlement of farmers' claims, that DIAMOND SERRAOCK has reimbursed and is reimbursing Central Soya for its payments in excess of said \$500,000 for the settlement of farmers' claims, and that Aetna is processing the settlement

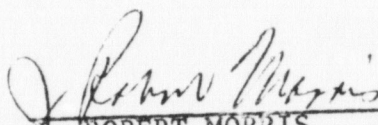
of those claims in excess of said \$500,000 at the expense of DIAMOND SHAMROCK.

WHEREFORE, defendant, AETNA CASUALTY & SURETY COMPANY, demands judgment:

1. Declaring that there were two "occurrences" within the meaning and intent of the Aetna Underlying Policy and the Home Excess Policy.

2. Declaring that its liability resulting from defects in the two Harrison lots is to indemnify DIAMOND SHAMROCK only for amounts DIAMOND SHAMROCK becomes legally obligated to pay up to \$250,000 for each such lot, subject to a deductible of \$100,000 for each such lot.

3. Granting it costs and expenses in this action, including counsel fees and disbursements, together with such other and further relief as the Court may deem just and proper.

  
J. ROBERT MORRIS  
Attorney for Defendant  
AETNA CASUALTY & SURETY  
COMPANY  
111 Fulton Street  
New York, New York 10038  
Telephone No.: 766-2528



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

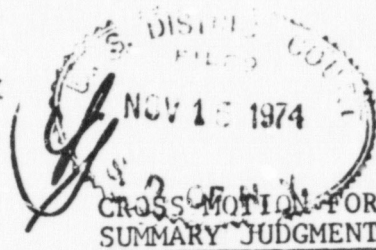
-----X  
THE HOME INSURANCE COMPANY,

Plaintiff,

-against-

THE ETNA CASUALTY AND SURETY COMPANY  
and DIAMOND SHAMROCK CORPORATION,

74 Civ. 4164 (RLC)



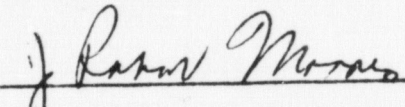
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S I R S :

PLEASE TAKE NOTICE that on the annexed affidavit of OTTO KAUFMANN, JR., sworn to the 13th day of November, 1974, the annexed Statement pursuant to Rule 9(g) of the General Rules of this Court and on all the pleadings herein, defendant ETNA CASUALTY & SURETY COMPANY, will cross move this Court at the time and place of the hearing on plaintiff's motion for Summary Judgment, for an order pursuant to Rule 56, F.R.C.P., granting summary Judgment for ETNA CASUALTY & SURETY COMPANY in accordance with the prayer for relief in the answer of said defendant on the grounds that there is no genuine issue as to any material fact and that said defendant is entitled to a judgment as a matter of law.

Dated: New York, New York, November 13, 1974

TO: TOWNLEY, UPDIKE, CARTER  
& RODGERS, ESQS.  
Attorneys for Plaintiff  
220 East 42nd Street  
New York, New York  
10017

CADWALADER, WICKERSHAM  
& TAFT, ESQS.  
Attorneys for Defendant  
DIAMOND SHAMROCK CORPORATION  
One Wall Street  
New York, New York 10005

  
J. ROBERT MORRIS  
Attorney for Defendant  
ETNA CASUALTY & SURETY COMPANY  
111 Fulton Street  
New York, New York 10038  
212-766-2528

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
THE HOME INSURANCE COMPANY,

Plaintiff,

-against-

THE ETNA CASUALTY AND SURETY COMPANY  
and DIAMOND SHAMROCK CORPORATION,

Defendants.  
-----X

STATEMENT PURSUANT  
TO GENERAL RULE 9(g)

74 Civ. 4164

Defendant, ETNA CASUALTY AND SURETY COMPANY,  
pursuant to Rule 9(g) of the General Rules of this Court, in  
opposition to plaintiff's motion for summary judgment and in  
support of this defendants cross motion for summary judgment,  
contends that the following are the material facts as to  
which there is no genuine issue of fact:

1. At all relevant times, DIAMOND SHAMROCK was  
insured under a liability policy issued by ETNA (the "Etna  
Underlying Policy") under which ETNA insured DIAMOND SHAMROCK  
against liability for damage to the property of others up  
to \$250,00 per occurrence, subject to a deductible of \$100,000  
per occurrence.

2. The ETNA underlying Policy contained the  
following provisions with respect to the definition of  
occurrence:

"occurrence" means an accident including  
continuous or repeated exposure to conditions,  
which results in bodily injury or property  
damage neither expected nor intended from the  
standpoint of the insured."

"... as respects products liability for  
bodily injury and property damage coverage:  
All such damage arising out of one lot of  
goods or products prepared or acquired by  
the named insured or by another trading  
under his name shall be considered as  
arising out of one occurrence." (batch clause)



3. At all relevant times, DIAMOND SHAMROCK was insured under an excess policy issued by Home (the "Home Excess Policy") under which Home indemnified DIAMOND SHAMROCK for legal liability for property damage in excess of \$250,000 per occurrence up to \$3,000,000 per occurrence, subject to the same definitions of "occurrence" as those set forth above with respect to the Aetna Underlying Policy.

4. At all relevant times, DIAMOND SHAMROCK produced superconcentrated Vitamin D3 resin at its Harrison plant. Each batch or lot of resin had a number assigned to it which was thereafter used by DIAMOND SHAMROCK for accounting and production purposes. After the resin was produced, one of three things could happen at the Harrison plant:

- (1) The resin was melted to form a blend and sold in that form directly to customers;
- (2) The resin was melted to form a blend and then mixed in corn oil and sold in that form directly to customers; or
- (3) The resin, after melting and mixing with corn oil, is shipped to the Louisville plant where it is sprayed on corn cob carriers to make Nopdex "200".

5. At all relevant times, DIAMOND SHAMROCK incurred products liability for property damage as a result of the following events:

- (a) DIAMOND SHAMROCK produced two lots of superconcentrated Vitamin D3 resin at its Harrison plant, assigning them lot numbers C498 and C500.
- (b) These two lots (C498 and C500) were melted to form a blend and then mixed with corn oil.
- (c) These two lots became inactive (defective) as a result of an accident which occurred during melting and blending and prior to mixing with corn oil at the Harrison plant.
- (d) These two lots were shipped to the Louisville plant where they were sprayed on corn cob carriers to make four lots of Nopdex "200", and assigned lot numbers 7356, 7436, 7466 and 7589. No grinding or blending occurred at the Louisville plant.
- (e) DIAMOND SHAMROCK sold the four Louisville lots

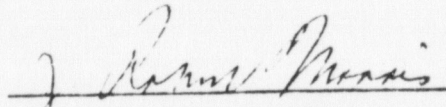
of Nopdex "200" to Central Soya Corporation which used them in making chicken feed.

- (f) The chicken feed made by Central Soya from the four Louisville lots of Nopdex "200" was defective because the two Harrison lots were defective as a result of an accident which occurred at the Harrison plant.

6. SHAMROCK and ETNA in retaining the "batch" clause in the Etna Underlying Policy intended thereby to limit the amount of loss incurred by the insured, consistent with the policy definition of "occurrence", so that when an accident occurred at any stage of the manufacturing process there would be only one "occurrence" with respect to each lot or batch to which an accident occurred.

7. In processing the settlement of farmer's claims ETNA and DIAMOND SHAMROCK have, in conformity with their mutual understanding of the "batch" clause, considered these claims as involving two occurrences and have allocated payments made in settlement of farmers' claims according to whether a particular claim was traceable to Harrison lot C498 or Harrison lot C500 as recorded on the books and records of DIAMOND SHAMROCK.

Defendant, ETNA CASUALTY AND SURETY COMPANY controverts paragraphs 4(c) and 4 (e) of Plaintiff's statement in so far as said paragraphs conflict with paragraphs 5 (d) and 5 (f) of this Statement.

  
J. ROBERT MORRIS  
Attorney for Defendant  
ETNA CASUALTY AND SURETY COMPANY  
111 Fulton Street  
New York, New York 10038  
212-766-2528



UNITED STATES DISTRICT COURT 50a  
SOUTHERN DISTRICT OF NEW YORK

-----X

THE HOME INSURANCE COMPANY,

Plaintiff,

-against-

THE ETNA CASUALTY AND SURETY COMPANY  
and DIAMOND SHAMROCK CORPORATION,

Defendants.

AFFIDAVIT OF  
OTTO KAUFMANN, JR.

74 Civ. 4164 (RLC)

-----X

STATE OF NEW YORK )  
                              : SS.:  
COUNTY OF NEW YORK )

OTTO KAUFMANN, JR., being duly sworn, deposes and  
says:

1. I am manager of the New York National Accounts  
Office of the defendant THE ETNA CASUALTY AND SURETY COMPANY.  
In 1969 as Manager of the Special Risk Division of the New York  
Underwriting Department I was involved in the negotiations  
leading up to the renewal of ETNA'S general liability policy  
covering the defendant DIAMOND SHAMROCK CORPORATION in February,  
1969. This affidavit is based upon my personal knowledge and  
upon ETNA'S records and reports prepared in the ordinary course  
of business.

2. ETNA has provided general liability coverage for  
DIAMOND SHAMROCK for at least the last 15 years. During that  
entire period of time ETNA'S policies have included a clause  
commonly known in the insurance industry as a "batch" clause.  
This clause provides as follows:

"...as respects products liability for bodily  
injury and property damage coverage:

All such damage arising out of one lot of goods  
or products prepared or acquired by the named  
insured or by another trading under his name  
shall be considered as arising out of one occurrence."

3. In 1966 the National Bureau of Casualty Under-  
writers adopted for industry usage a new, revised general  
liability policy which eliminated the "batch" clause and

contained, among other things, a new definition of "occurrence" as follows:

"'occurrence' means an accident including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

4. The National Bureau eliminated the "batch" clause for the reason that it felt that the new definition of occurrence had the same effect as the "batch" clause.

5. During negotiations for a renewal of the policy to come into effect February 1, 1969, the insured, DIAMOND SHAMROCK, through its brokers, Alexander & Alexander, Inc., insisted on inclusion of the batch clause in the renewal policy even though it contained the new definition of "occurrence" as quoted above.

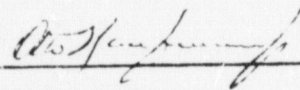
6. The purpose and intent of continuing the batch clause in the policy was to limit the amount of loss incurred by the insured so that there would be one "occurrence" for each "batch" or "lot" with respect to which an accident occurred, or, in other words to make clear that the definition of occurrence as it pertains to a "lot" follows the manufacturing process so that as soon as a batch or lot is separated and identified with a lot number at any stage of the manufacturing process it then becomes a "lot" within the meaning of the batch clause and any accident occurring to that lot is an "occurrence" within the meaning of the policy irrespective of any subsequent subdivisions of the lot in the preparation and distribution process.

7. DIAMOND SHAMROCK insisted on this batch clause in order to minimize its losses under the policy because it was on a retrospective rating plan and it was to its financial interest to keep to a minimum consistent with the concept of a occurrence under the policy the number and amount of losses. This was understood by both parties to the insurance contract.



8. I have read the affidavit of Mr. Robert H. Burns, dated October 21, 1974, submitted in support of plaintiff's motion for summary judgment and disagree with his conclusions as to the application of the "batch" clause to the facts of this case. It is undisputed that an accident occurred at the Harrison plant in the production of the two lots (C498 and C500) of superconcentrated Vitamin D3 blended in corn oil. Investigation disclose that these two lots became inactive (defective) as a result of an accident which occurred during the processing of these two lots at the Harrison plant. These two lots were then shipped to the Louisville plant where they were sprayed on the corn cob fractions and then shipped out to the customer (Central Soya Corporation) in four shipping lots (7356, 7436, 7466 and 7589). The four Louisville lots were defective because the two Harrison lots were defective.

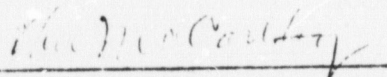
9. In processing the settlement of farmers' claims arising by reason of these defective lots ETNA and DIAMOND SHAMROCK, consistent with their mutual understanding of the "batch" clause, have always treated this as two occurrences and have allocated payments made in settlement of farmers' claims according to whether a claim was traceable to Harrison lot C498 or to Harrison lot C500 as recorded on the books and records of DIAMOND SHAMROCK.



OTTO KAUFMANN, JR.

SWORN TO BEFORE ME THIS

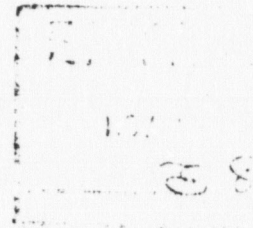
13TH DAY OF NOVEMBER, 1974.



Notary Public.

JOHN MCCARTHY  
NOTARY PUBLIC  
New York  
City  
County

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
THE HOME INSURANCE COMPANY,  
Plaintiff,

74 Civ. 4164 (RLC)

-against-

THE AETNA CASUALTY AND SURETY  
COMPANY and DIAMOND SHAMROCK  
CORPORATION,

ANSWERING STATEMENT  
PURSUANT TO GENERAL  
RULE 9(c)

Defendants.  
-----x

Plaintiff submits this statement in answer to the statements made by each defendant in connection with its cross-motion for summary judgment.

1. Plaintiff admits that the two lots of Vitamin D3 resin made by Diamond Shamrock at its Harrison, New Jersey plant became defective because of a production mistake but controverts so much of paragraph 2 of Diamond Shamrock's Rule 9(g) statement and paragraphs 5(c) and 5(f) of Aetna's Rule 9(g) statement as refers to that production mistake as an "accident" on the ground that, as a matter of law, that mistake was not an "accident" within the meaning of the Aetna underlying policy.

2. Plaintiff contends that as a matter of law the Aetna underlying policy should be interpreted without resort to extrinsic evidence and therefore that such evidence does not



present a triable issue of fact. However, plaintiff disputes the extrinsic evidence offered by defendants and therefore controverts paragraphs 5 and 6 of Diamond Shamrock's Rule 9(g) statement and paragraphs 6 and 7 of Aetna's 9(g) statement.

Dated: November 21, 1974  
New York, New York

TOWNLEY, UPDIKE, CARTER & RODGERS

By



A Member of the Firm

Attorneys for Plaintiff The  
Home Insurance Company  
220 East 42nd Street  
New York, New York 10017  
(212) 682-4567

[illegible]

AFFIDAVIT OF  
ARTHUR J. MELLA

Defendants.

[illegible]

ARTHUR J. MELLA, being duly sworn, deposes and says:

2. I have been Home's Manager of Excess Claims since November, 1973. Before that I was Assistant Manager, Excess Claims for two years and Excess Claims Supervisor for one year. Prior to my employment by Home, I was employed for 10 years by Liberty Mutual Insurance Company as a Claims Adjuster and Supervisor.



3. I am a Chartered Property and Casualty Underwriter ("CPCU"). I became a CPCU in 1972. I received that title based upon my experience in the insurance industry and my successful completion of five examinations in insurance, law, economics and accounting. Throughout my career I have attended industry-wide meetings and programs in the liability and casualty insurance field. Because of my background, education and training, I feel that I am familiar with the customs and practices of the insurance industry, particularly those related to liability insurance.

Insurance Industry  
Custom and Practice

4. I have read the affidavits of William R. Greening and Michael Collins of Alexander & Alexander, insurance brokers for Diamond Shamrock, and of Otto Kaufmann, Jr., an employee of Aetna. These affidavits purport to state customs, practices and understandings in the insurance industry, presumably for the purpose of aiding the Court in interpreting the policy language before it.

5. The only industry-wide understandings with respect to the interpretation of insurance policies are that the final arbiter of the meaning of an insurance policy is a Court called upon to interpret it, and that Courts will interpret policies based upon the common or popular meaning of the words used therein. Industry custom and practice, therefore, is to attempt to phrase insurance policies in language understandable to the average

insured. It is definitely not the custom, practice or expectation in the industry that policies are to be given a technical meaning possibly intended by underwriters but not expressed in the policy, or that evidence of a meaning differing from the plain common meaning of the language used will ever be offered to a court as a construction aid.

6. I have been advised by counsel that evidence submitted by affidavit purporting to state insurance industry custom and practice as to interpretation, or purporting to describe industry understanding or the intent of standard policy drafting organizations such as the Mutual Insurance Rating Bureau or The National Bureau of Casualty Underwriters should not be considered by a Court in interpreting the insurance policy. Nevertheless, the "understandings" of the industry and the reasoning attributed to these bureaus by Messrs. Greening, Collins and Kaufmann are so at variance with the facts that I feel compelled to set the record straight.

7. Both Mr. Greening and Mr. Kaufmann swear that the new definition of "occurrence" in the 1966 CGL Policy Form was intended or understood to make the "batch" clause unnecessary. They say that where a manufacturing error rendered one "batch" of a product defective, with the consequence that many people later suffered personal injury or property damage as a result of the defect, the draftsmen's intent was that the manufacturing



error would constitute one "occurrence" regardless of the number of separate resulting injuries so that the "batch" clause would not be required to reduce the number of occurrences from many to one. Nothing could be further from the truth.

8. The 1966 CGL Policy Form was the product of the Joint Forms Committee of the Mutual Insurance Rating Bureau and The National Bureau of Casualty Underwriters. That committee deliberated for years over the definition of "occurrence." One of its members was Mr. G. Katz of defendant Aetna. He wrote a memorandum to the Committee on October 6, 1964 describing the "occurrence" clause, which then contained the present language "which results in bodily injury or property damage." Previous drafts, tying the definition to the cause of such injury, rather than the result, had been rejected. A copy of Mr. Katz' memorandum is annexed hereto as Exhibit "A". He wrote:

"The subcommittee agreed that any attempt to identify the time of loss for coverage purposes with the causative event, even the immediate cause, would be subject to a grave risk of misconstruction by the Courts--the risk that remote proximate cause would be identified as the accident by the Court to hold a company responsible many years after the coverage ceased to exist.

"While it is recognized that the time trigger, 'exposure...which results, during the policy period, in ... injury,' is no panacea, on balance it seems to come closest in words to the underwriter's intent. The Subcommittee believes that this language does not permit a Court to reasonably misconstrue the intent that the time of coverage shall be the time of the injurious contact with the immediate means of the injury."

9. Mr. R. A. Schmalz of Liberty Mutual Insurance Company was also on the Joint Forms Committee. He prepared a chronology of the Committee's deliberations on the definition of "occurrence," which Mr. Katz attached to his memorandum and which will be found as Exhibit 1 to Exhibit "A" hereto. At page 4 of the chronology, Mr. Schmalz says:

"It should be noted here that the Joint Drafting Committee was making a shift in emphasis from the positive statement that we would cover the effects of causation during the policy period no matter when resulting to a positive statement that we would cover results during the policy period no matter when causation took place."

10. A third member of the Committee was R. J. Wendorff of Employers Mutual Liability Insurance Company. Mr. Wendorff addressed the Section of Insurance, Negligence and Compensation Law of the American Bar Association at its 1966 meeting. His subject was "The New Standard Comprehensive General Liability Insurance Policy." His address is reported at pp.250-264 of the bound 1966 proceedings. A copy of his address is annexed hereto as Exhibit "B". As to the definition of "occurrence," he said at page 254:

"Under the new policy, the timing device, or 'trigger' for coverage is clearly set forth as the time when the bodily injury or property damage occurs."

11. Nowhere in the annexed explanations of the evolution of the "occurrence" definition is there even a reference to the "batch" or "lot" clause, and for good reason. Since there is no



"occurrence" until a third party suffers bodily injury or property damage, the definition of "occurrence" could not possibly have been intended to remove the need for a "batch" or "lot" clause. Damage to a "batch" or "lot" is not an "occurrence." An "occurrence" is damage to the body or property of a third party which results from a defect in the "batch" or "lot." The number of "occurrences" therefore is the number of separate injuries and is completely independent of the number of "batches" or "lots" that caused those injuries.

12. It is my understanding that the "batch" or "lot" clause was eliminated from the 1966 CGL policy because an insurer could limit its "aggregate" liability under the products hazard, regardless of the number of "occurrences," as Aetna has here by limiting its CGL Property damage liability to \$1,000,000.00 aggregate.

13. Mr. Collins offers the court what he claims to be "the customary understanding and usage in the industry" as to the applicability of the "batch" clause where one batch of an intermediate becomes defective and is used to make several batches of the final product. The only apparent source of Mr. Collins' knowledge of custom and practice is what he saw done at the Insurance Company of North America. I have been handling claims for a good deal longer than Mr. Collins. I am aware of no such custom and practice. As a matter of fact, I have never seen a

situation in which defects were found to exist in a series of batches, some of which were batches of intermediates, and others of which were batches of final product. I doubt that Mr. Collins has, for he has supplied no examples.

14. Even if there were an industry-wide understanding as to how the batch clause should apply in such a situation, which there is not, that understanding would not govern. What would govern is the plain language of the clause. As an experienced claims man, I would apply the language in accordance with its common everyday meaning. Since the clause speaks in terms of "one lot of goods or products" and creates limits on the liability of the insurer for damages to third persons resulting from defects in the insured's "products," I would conclude, and I think every objective claims man would conclude, that the clause limits the insurer's liability by deeming there to be one "occurrence" for each lot of defective product sold by the insured.

Defendants' Claimed  
"Secret Intent"

15. The Greening and Kaufman affidavits state that because the Aetna policy contained a per occurrence deductible of \$100,000 and was retrospectively rated, Diamond Shamrock and Aetna had the intention and understanding that the definition of "occurrence" and the "batch" or "lot" clause would always be read to produce the fewest "lots" possible in order to make Aetna's liability under the policy as small as possible.



16. Assuming that this was the joint intent and understanding of Diamond Shamrock and Aetna, it was not communicated to Home. Home's excess policy, for purposes here relevant, adopts Aetna's definition of "occurrence" and Aetna's "batch" or "lot" clause. It does not adopt any special oral understanding. Home's policy was underwritten and issued based upon a written description of the coverage of the Aetna policy. A copy of that description is annexed hereto as Exhibit "C". Home was given no further information, either orally or in writing, as to any special intent or understanding of Aetna and Diamond Shamrock with respect to the meaning of "occurrence" or the applicability of the "batch" or "lot" clause. Indeed, Home was not even advised that the Aetna policy contained a \$100,000 per occurrence deductible.

*Arthur J. Mella*  
 \_\_\_\_\_  
 ARTHUR J. MELLA

Sworn to before me this  
 20th day of June, 1974

*Raymond T. Wellington*  
 \_\_\_\_\_  
 NOTARY PUBLIC

RAYMOND T. WELLINGTON  
 NOTARY PUBLIC, State of New York  
 No. 30-6000250  
 Qualified in Nassau County  
 Term Expires March 30, 1976

October 2, 1964

Memorandum to: Joint Forum Committee

From: Subcommittee on Definition of "Occurrence"

Your Subcommittee met in Hartford on Friday, October 2, 1964, for the purpose of giving further consideration to the means of properly expressing the concept of "occurrence" in the forthcoming policy revision in the light of the most recent JFC discussions and prior deliberations. Mr. Schmalz prepared a historical resume of previous drafts (Exhibit I) which formed a starting point. A final proposal on the matter and a draft recommendation is also included herewith (Exhibit II).

The three general functions of the concept of occurrence were identified as:

- (1) to require fortuity,
- (2) to identify the time of the loss for coverage purposes, and
- (3) to assure the proper application of limits in the event of multiple losses or claims, or long term losses in excess of policy limits.

It was again recognized that the word "accident" has been subjected to judicial constructions that remove the element of fortuity, as well as suddenness. However, it was concluded that the word could not be wholly discarded from the concept because it still retains most of its "pristine vigor" as respects the application of limits, and is still helpful in most cases to denote time of coverage.

The Subcommittee agreed that it could not define the point at which a series of time-related losses cease to be a single accident. It felt, however, that since Courts have already spoken of many repeated exposure cases as accidents, the concept of an occurrence would be improved by language which concedes that exposure cases are a kind of accident. Hence the language speaks of an accident as including an injurious exposure. In this way, the intent of the last paragraph of the Limits Provision is buttressed, and a related series of events which a Court might view as separate accidents (damaged windows - water leaking down through several building floors) is more effectively subject to a single limit.

The Subcommittee agreed that any attempt to identify the time of loss for coverage purposes with the causative event, even the immediate cause, would be subject to a grave risk of misconstruction by the Courts--the risk that remote proximate cause would be identified as the accident by the Court to hold a company responsible many years after the coverage ceased to exist.

While it is recognized that the time trigger, "exposure...which results, during the policy period, in . . . injury," is no panacea, on balance it seems to come closest in words to the underwriter's intent. The Subcommittee believes that this language does not permit a Court to reasonably misconstrue the intent that the time of coverage shall be the time of the injurious contact with the immediate means of the injury. If in a



delayed emergence case the proof of the cause of action ultimately identifies the emergence and not the exposure as the time trigger for liability, this is a situation we can live with. If the allegations of a complaint force the case upon the insurer at the time of the emergence, he will control the litigation and will seek to force out proof of the time and circumstances of contact as a proper and necessary part of defending the insured against liability. If such an issue arises as between two or more insurers, the problem is still one of proof, based upon known facts. The requirement that there must be a result in the policy period forces the time back to the time of the first effect of the insured's wrongdoing. A more worsening of injury cannot be said to be an injury that occurs, unless that worsening is caused by the intervention of a new force (in which event, the insurer of the intervening force of wrongdoing would intend the coverage).

The Subcommittee seriously considered the objections previously made to this approach on the ground that it could be said that death was a separate injury that results at a different time. To forestall this result the policy was previously redrafted to treat death, like care and loss of services, as an element of damages. The Subcommittee noted that this approach is even more effective under the definition of "damages" (See Exhibit II), as recently amended, which reads: "damages" means those damages which are payable because of bodily injury...to which this policy applies, including...damages for death...resulting therefrom." Such a definition forces the construction that subsequent death can only relate to the bodily injury which caused it, and the Subcommittee proposes a rearrangement of commas to further strengthen this construction.

In its discussion, the Subcommittee also considered the double anchor approach of tying the occurrence to both cause and effect. This was rejected because of merchandising problems to be anticipated from those who would claim that this created a coverage gap. It was also believed that the proposed definition (Exhibit II) continued, in effect, the "middle anchor" achieved by the 7/15/64 draft.

However, in order to forestall the argument by Claimant B that his injury in a later policy period is covered because it arose out of an "occurrence" resulting in injury to Claimant A in the policy period, the proposal includes a "Policy Period" condition which limits coverage to injury "which occurs" during the policy period. This familiar condition also deals with the territorial limitation which is newly expressed in more positive terms.

While the Mutual Bureau Rating Committee has voiced some objection to language similar to the proposed "occurrence" definition on the ground that it fails to exclude an incident where both expected and unexpected injury results, it is our belief that except where the expected injury is inconsequential, the proposed language effectively excludes all expected or intended injury. Any other language tends to create ambiguity and other problems of drafting.

Finally it must be noted that the proposed language, while permitting a proration of loss where there has been a continuing exposure over several policy periods, does not encourage the breaking down and evaluation of units of exposure by policy periods, but rather places emphasis on the

Joint Forms Committee

-3-

October 6, 1964

time of the resulting injury. However, if the insurer currently on the risk when the injurious quality of a harmful condition is discovered can show that harmful exposures had previously resulted in some of the injury, it can seek and obtain a proration. The difference, then, from the causation approach is not substantive but merely procedural, in that it places a certain burden on the insurer of the period of final injurious exposure to prove the involvement of any prior insurer. This would seem to be consistent with the basic theme of underwriting intent which is to have, as completely as possible, a finite time limit upon liability arising in the future, without leaving an insured devoid of coverage. It nevertheless enables an insurer to seek an equitable proration from a previous carrier that removed itself in the midst of an injurious exposure which had begun to "result" in injury.

GK:mk



VARIOUS APPROACHES CONSIDERED TO DATE  
OCCURRENCE COVERAGE

Joint Drafting Committee Draft 9/7/60 (Considered at Skytop Meeting)

Under this draft the basic Insuring Agreement provides that the policy applies to bodily injury or property damage occurring during the policy period without the insured's expectation or intent and caused by an accident or by continuous or repeated exposure to conditions within the policy territory."

The basic Insuring Agreement contains a second paragraph providing that: "All bodily injury and property damage sustained by the same person or organization as the result of one accident or continuous or repeated exposure to substantially the same general conditions shall be deemed to occur when the first of any such injury or damage becomes manifest.

Under this approach no definition of an accident or occurrence was felt to be necessary or desirable.

In commenting on the approach the Joint Drafting Committee said in its explanatory memorandum: "The occurrence of injury is determined when injury becomes manifest. The word 'manifest' which means 'visible, open, clear, evident' seems to us to be the most satisfactory word for our purposes to express the time when injury occurred. The word 'occurred' itself is too vague as it may range from mere exposure to culmination."

2. Dec 11/60 Draft (Presumably the result of the Skytop Meeting)

Under this approach the basic Insuring Agreement provides that the policy applies to bodily injury or property damage occurring during the policy period and caused by an accident or occurrence within the policy territory."

The word "accident" is defined as "a sudden event, or a related series or combination of such events, which occurs without the insured's expectation or intent. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured."

The term "bodily injury" is defined as "bodily injury, sickness or disease, including death resulting therefrom, sustained by any person. All bodily injury sustained by the same person as the result of one accident or occurrence shall be deemed to occur when the first of any such bodily injury becomes manifest."

The term "occurrence" is defined as "continuous or repeated exposure to conditions, if the bodily injury or property damage occurs without the insured's expectation or intent. All such bodily injury

and property damage caused by continuous or repeated exposure to substantially the same general conditions shall be deemed to be the result of one occurrence."

The term "property damage" is defined as "physical injury to or destruction of tangible property. All property damage sustained by the same person or organization as the result of one accident or occurrence shall be deemed to occur when the first of any such property damage becomes manifest."

3. The 11/15/60 Draft, prepared for the November 29 - December 1, 1960 Meeting of the Joint Forms Committee.

The basic Insuring Agreement provides that the policy applies "to bodily injury or property damage caused by an occurrence within the policy territory."

The word "accident" is defined as "a sudden event (including any related series or combination of such events following as a consequence thereof) which is neither expected nor intended by the insured. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured."

The term "bodily injury" and the term "property damage" are defined in essentially the same way as in the 11/60 Draft.

The term "occurrence" is defined as: "(1) an accident during the policy period or (2) continuous or repeated exposure to conditions during or prior to the policy period, if the bodily injury or property damage occurs during the policy period and is neither expected nor intended by the insured. All such bodily injury and property damage caused by continuous or repeated exposure to substantially the same general conditions shall be deemed to be the result of one occurrence."

This approach is interesting because the Joint Drafting Committee was clearly distinguishing accident cases from continuous or repeated exposure cases. The Committee also clearly recognized that injury or damage could occur after the exposure which caused it and deliberately avoided a "double anchor" by specifically providing that coverage attached even though the exposure to conditions took place prior to the policy period.

4. The 5/4/61 Draft (approved by the Joint Forms Committee)

As a result of general dissatisfaction over previous drafts, the Joint Forms Committee suspended discussion of the "accident - occurrence" problem after the December 1960 Meeting and instructed the Joint Drafting Committee to reconsider the problem. Messrs. Katz, Schmalz and Schoen made a detailed study of the problem and



and proposed that we retain "caused by accident" in the Insuring Agreement, reinstate the "Policy Period; Territory" Insuring Agreement, refer to "accidents during...", and define accident merely as including "continuous or repeated exposure to conditions." At the same time an intentional injury exclusion was proposed.

In their memorandum of April 17, 1961 the proponents of this simpler approach said: "While admittedly there remains the possibility that a court will equate the accident with the negligent act or omission in a non-products situation, there are a number of well considered cases that properly read 'caused by accident' to mean the happening of injury, not the proximate cause of it. See 57 ALR 2d 1385. It was the very real fear of upsetting this crucial distinction that convinced us that we should not risk defining an occurrence in a standard provisions policy."

The 5/4/61 Draft adopted the recommendations of the sub-committee.

5. The 5/31/63 Draft of the Joint Drafting Committee.

Although the 5/4/61 Draft was satisfactory to the Joint Forms Committee, the Joint Rating Committees specifically requested that we use a definition of "occurrence" for merchandising reasons and that we include the exclusion with respect to intentional or expected injuries in the definition of occurrence.

The 5/31/63 Draft provides in the basic Insuring Agreement that the policy applies to bodily injury or property damage caused by an occurrence.

The term "occurrence" is defined as "an accident or continuous or repeated exposure to conditions, provided the injury or damage is neither expected or intended from the standpoint of the insured. Assault and battery shall be deemed an occurrence unless committed by or at the direction of the insured."

The definitions of "bodily injury" and "property damage" contain no "deemer" provisions.

The Draft contains an "Application of Policy" section providing that coverage applies "only to bodily injury or property damage which results from contact with the means of injury during the policy period..."

This approach was adopted by the Rating Committee of the National Bureau, although the Committee questioned the adequacy of the word "contact" and expressed a concern that it might create a merchandising problem because of the agent's and broker's fear that we were somehow seeking to reintroduce an aspect of the accident concept in requiring some physical contact.

4. The 9/10/63 Draft of the Joint Drafting Committee (second revision)

The 5/31/63 Draft, although approved by the National Bureau's Liability Rating Committee, was subjected to further review by Mr. Katz and his conferees, who expressed great concern over the "Application of Policy" and particularly the "Contact" language. They felt that it might be improved upon by adding a few words to the second line to read "damage which occurs and results from physical or other contact with the means of injury..." This was intended to inject again the flavor of the manifestation rule, but Mr. Graham was particularly concerned that cases might arise where there might be several non-injurious contacts with the means of injury wholly unrelated to the cause thereof in a legal sense but which might be factually related to the cause.

Independently of Mr. Katz, I had been reviewing the contact with the means of injury approach and had some misgivings about emphasizing causation to such an extent.

As a result of the unfavorable reaction in Hartford and my own misgivings, the Joint Drafting Committee reviewed the matter and decided to start from scratch.

Mr. Katz proposed that we acknowledge that a continuous or repeated exposure to conditions is nothing unless it has an impact and that we again acknowledge that the occurrence about which we speak is not the legal cause of the bodily injury or property damage, but that the bodily injury is the factual result of the occurrence. I agreed with these proposals.

The 9/10/63 Draft provides in the Basic Insuring Agreement that the policy applies "to bodily injury or property damage caused by an occurrence."

The term "occurrence" represents the new approach and is defined as "an accident or exposure to conditions which result in bodily injury or property damage during the policy period provided the injury or damage is neither expected nor intended from the standpoint of the insured. Assault and battery shall be deemed an occurrence unless committed by or at the direction of the insured."

It should be noted here that the Joint Drafting Committee was making a shift in emphasis from the positive statement that we would cover the effects of causation during the policy period no matter when resulting to a positive statement that we would cover results during the policy period no matter when causation took place.

We felt that this approach was a happy compromise for a number of reasons. We could retain the time honored "accident" without artificial props. Yet by emphasizing results we would avoid courts construing accident as the remote negligence. We further felt that although in most cases injury would clearly be simultaneous with



impact (or the "accident" or "exposure") by requiring that injury actually result we would tend to shift long term exposure cases, such as cancer from cigarette smoking, or from radiation, to the policy where some demonstrable injury became evident. We felt, in other words, that we were giving these cases a push in the direction of manifestation of injury, without highlighting it and without introducing artificial language that might be construed more broadly than we intended.

This definition of "occurrence" was acceptable to the Joint Conference Committee of the two rating Bureaus.

At the Wagon Wheel Meeting of the Joint Forms Committee, however, it was felt that there was some danger of pyramiding limits in bodily injury cases which later resulted in death, so that a reference to "death" in the definition of "bodily injury" was eliminated, but an adjustment was made in the definition of "damages" to include those which are payable on account of death.

7. The 10/17/63 Draft of the Joint Drafting Committee (second revision)

This Draft was considered by the Joint Forms Committee and approved at the meeting in New York. The only difference in the definition of the term "occurrence" from that of the 9/10/63 Draft is the change of the word "occurrence" in the definition itself to "accident" in the sentence regarding assault and battery.

8. The 7/15/64 Draft of the Joint Drafting Committee.

Although the previous definition of "occurrence" had been approved by the Joint Forms Committee and was satisfactory to the Joint Conference Committee of the two rating Bureaus, there were still some unresolved points in connection with the scope of coverage. The Mutual Bureau was not entirely satisfied with the specific reference in the definition of "occurrence" to the bodily injury or property damage which was neither expected nor intended. They preferred to eliminate the definite article as a modifier to state the exclusion in more general terms. The National Bureau was dissatisfied with the word "physical" as a modifier of the word "injury" in the term "property damage." As a result of a compromise the Mutual Bureau agreed to eliminate the word "physical" as recommended by the National Bureau and the National Bureau agreed to eliminate the word "the" in the definition of occurrence.

The 7/15/64 Draft in dealing with the latter point defines occurrence as "an accident or exposure to conditions which results, during the policy period, in bodily injury or property damage which is neither expected nor intended from the standpoint of the insured."

## (Insuring Agreement)

. . . to pay as damages because of

- A. bodily injury, or
- B. property damage

caused by an occurrence, and . . .

## (Definitions)

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

"damages" means those damages which are payable because of bodily injury or property damage to which this policy applies, including, respectively, damages for death and for care and loss of services and damages for loss of use of property, resulting therefrom;

## (Jacket Provision)

## POLICY PERIOD; TERRITORY

This policy applies to bodily injury or property damage which occurs during the policy period within the policy territory.

"Policy territory" means:

- (1) the United States of America, its territories or possessions, or Canada, or
- (2) international waters or air space, provided the bodily injury or property damage does not occur in the course of travel to or from any other country, state or nation, or
- (3) elsewhere in the world if, the bodily injury or property damage is included within the product liability, the product out of which the bodily injury or property damage arises was sold for use or consumption within the territory described in paragraph (1) above, and the original claim or suit for damages is brought in such territory.



## EXHIBIT L

THE NEW STANDARD COMPREHENSIVE  
GENERAL LIABILITY INSURANCE POLICY

By

ROLAND J. WENDORFF

As many of you may already know, the "standard" general liability and automobile liability policies have been completely revised effective October 1, 1966. Mr. Allan P. Gowan, Glens Falls, New York, and I have been asked to explain the changes in the new "standard" Comprehensive General Liability Policy. Mr. Gowan and I have divided this assignment as follows: I will explain the changes in the policy other than those involving completed operations and products liability insurance. Mr. Gowan will explain the changes in the policy which relate to completed operations and products liability insurance.

For the past several years the Subcommittee on Insurance Coverages planned to present at the annual breakfast meeting a discussion of the revised standard Comprehensive General Liability Insurance Policy. However, each year that portion of the program had to be deferred because the apparently imminent promulgation of the new policy by the Mutual Insurance Rating Bureau and the National Bureau of Casualty Underwriters was delayed. When the Bureaus eventually filed the new policy form with the insurance departments of the various states, the die was cast, and a discussion of the new policy form was assigned a place on the program.

The underwriting and policy drafting committees of the Bureaus have labored over the new Comprehensive General Liability Insurance Policy for more than six years. Its various provisions have been considered, reconsidered, drafted, revised, adjusted, shimmied up, filed down, and calked by them in an attempt to more clearly express what is sometimes referred to as the "underwriting intent." However much it may be castigated or ridiculed by lawyers who defend claims under it, or by judges who try to interpret it, it cannot be said that it was conceived in haste and hurriedly drafted!

Because the new Comprehensive General Liability Policy has been so long in the making and its actual use has been delayed more than a year after the initial filing with the various state insurance departments, it has been subjected to more than the usual amount of scrutiny which accompanies a policy revision. Insurance managers, counselors, buyers, advisors, brokers and lawyers have all taken turns at criticizing, praising, explaining and interpreting the new policy--and all this before a single new policy has been sold to a policyholder! Their comments have been published in many of the insurance and legal journals and papers. The only group that has not had an opportunity to get a crack at the new policy is the courts. However, I am sure that when they start their work of interpreting the new policy, they will find meanings in its provisions which the underwriters did not intend and which the policy drafters were certain they were not expressing.

In the interests of your time and our labor, Mr. Gowan and I are going to have to assume that you are generally familiar with general liability insurance and have a working acquaintance with the current Comprehensive General Liability Policy. Since it would be impossible in the time allotted to us to present a line-by-line comparison of the new Comprehensive General Liability Policy with the current policy, we will attempt only to outline the more important areas where the new policy departs from the current policy.

There has been one advantage in preparing this paper on the new Comprehensive General Liability Policy. Not having been sold yet, the policy has not so far been "tested" by the courts. Consequently, there is no case law to research. Since it is hoped that the new policy will mend the "errors" of the courts in their interpretations of the current policy, it isn't necessary to engage in lengthy and detailed analyses of decisions interpreting the current policy.

### Standard Policies

At this point I should briefly explain what is meant by "standard" policies. The National Bureau of Casualty Underwriters, a rating organization composed of stock insurance companies, and the Mutual Insurance Rating Bureau, a rating organization composed of mutual insurance companies, have developed through the joint efforts and co-operation of their Underwriting and Policy Forms Committees so-called "standard" general liability and automobile policies which their member companies are required to use. These policies are not "standard" from the standpoint of being a statutory policy, such as the fire policies. Insurance companies which are not members of either of these rating organizations may, of course, prepare their own policy forms. However, the "standard" policies which have been promulgated by the two rating organizations under their National Standard Policy Provisions Program have become a standard of comparison for other "nonstandard" policies. As a matter of fact, many of the nonbureau or independent insurers use the "standard" general liability and automobile policies with little or no variation. Although we are concerned in this discussion only with the comprehensive general liability form, it should be noted that because of the revised editorial approach to the drafting and substantive changes, it has been necessary to revise the Standard Comprehensive Automobile Liability Policy and other standard general liability policies and endorsements as well as the Comprehensive General Liability Policy.

### Changes in Format

The revisions of the General Liability and Automobile Liability Policies appear in a completely new format which will permit companies to combine or assemble coverages and groups of coverages in a variety of ways. The Standard Provisions Portfolio of Forms for General Liability and Automobile Liability Insurance will be made up of a basic unit which might be described as the "jacket," and various standard Coverage Parts,



one or more of which, together with the jacket, will form a complete policy. The jacket contains the provisions which are common to all of the related Coverage Parts, such as the Supplementary Payments provision, the Definitions and the Conditions. Each of the separate Coverage Parts contains a section describing the coverage afforded, the exclusions applicable to the coverage, a statement of who is insured under the policy, a statement of the limits of liability, and those additional definitions and conditions which are applicable only to that Coverage Part. It will be possible to assemble as one policy several types of insurance, such as comprehensive general liability and comprehensive automobile liability, by use of the basic jacket together with the separate Comprehensive General Liability Insurance Coverage Part and the Comprehensive Automobile Liability Insurance Coverage Part. Companies may also print as a single unit forming a separate policy the jacket and the provisions of one or more Coverage Parts. Since there is a variety of ways in which companies may physically print and assemble their policies, the new Standard Comprehensive General Liability Policy forms used by the various companies will not necessarily be similar in appearance.

I should make two other general comments on the format of the new policy before getting into the actual changes in the coverage. The new policy uses the "definitions" approach to a greater extent than any other policies presently in use. This should make the statement of the coverages and the exclusions less complicated, shorter and more readable. A defined word or phrase will mean the same thing in the statement of coverage as it does in the exclusions.

The exclusions must immediately follow the statement of the coverages. In the current policies, the exclusions appear in the middle of the policy. The reason for requiring the exclusions to immediately follow the statement of coverage is to call to the insured's attention the fact that the coverages are subject to exclusions. It should also prevent some courts from holding, as they have on occasion in the past, that the insurance company misled the poor insured by setting forth the coverages on the first page in large bold type and hiding the exclusions on the last page in small type!

### Occurrence

No provision in the current policy has caused more controversy or produced more litigation between the insurers and their insureds than the requirement that the bodily injury or property damage must be "caused by accident." The coverage under the new policy has been broadened to an "occurrence" basis. The statement of coverage in the new policy provides that:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this policy applies, caused by an occurrence, . . .

Perhaps the principal reason for writing the new policy on an occurrence rather than an accident basis was because the courts have largely

ignored the historical concept of an accident as intended by the underwriters under the current policy—that is, a sudden and unexpected event which is identifiable in time and place. Many courts held that bodily injury or property damage resulting from a gradual exposure to conditions was “caused by accident” within the meaning of the policy. The decision of the underwriters to provide occurrence coverage was undoubtedly influenced by the fact that many courts were interpreting “caused by accident” policies to give occurrence coverage. Then, too, policies written on a “caused by accident” basis created claim handling problems. The claim departments of the companies were faced with the problem of whether to handle coverage questions on a strictly “caused by accident” basis as intended by the underwriters, or under the liberal interpretation of “caused by accident” by many courts. There was a lack of uniformity between companies, and even within a single company, depending upon the applicable decisions in the jurisdiction where the bodily injury or property damage occurred. Finally, many of the more sophisticated insureds who had available the talents of insurance advisors, counselors and attorneys, insisted on the companies endorsing their policies to provide occurrence coverage. Under the new policy, all coverage will be on an occurrence basis. This should result in a more uniform interpretation of coverage by both the companies and the courts.

One of the reasons “caused by accident” caused so many problems under the current policy was that the term “accident” was not defined. Therefore, the courts were able to adopt their own definition of the term “accident” to fit the facts and circumstances of the particular case which they were deciding. The new policy defines “occurrence” as “an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” Since “occurrence” includes “injurious exposure to conditions,” the new policy will provide coverage for injury to persons or property which is a gradual result of injurious exposure over a period of time. Thus, the historical concept of an accident—a sudden event which is identifiable in time and place—is no longer a requirement for coverage.

In addition to providing coverage for injury to persons or property which is the result of a gradual exposure over a period of time, the definition of “occurrence” in the new policy is also intended to handle several other problems which have caused difficulty under the current policy and which arose out of the use of the word “accident.” The current policy applies to “accidents which occur during the policy period.” It was assumed that the accident and the bodily injury or property damage which resulted from it occurred almost simultaneously. However, a few courts held that the accident occurred when the negligent act occurred and not when the negligent act resulted in the actual injury to person or property. Thus, for example, it was held that the policy applied in a case where the insured negligently constructed a porch railing during the policy period, but the claimant fell off the porch as a result of the defect in the railing months after the policy had expired. The definition of “occurrence” in the new policy requires that the accident and exposure result “during



the "policy period" in the bodily injury or property damage. Under the new policy, the timing device, or "trigger," for coverage is clearly set forth as the time when the bodily injury or property damage occurs. In most cases the act which causes the injury and the injury will be concurrent. However, the new approach should be helpful in those cases where, contrary to intent, the courts have used the negligent act as the "trigger" for coverage, even though the negligent act was only the remote cause of the injury.

In recent years, some courts have held that the question whether or not there was an accident should be determined from the standpoint of the claimant. Therefore, even though the insured's act which caused the injury to the claimant was intentional, or the insured could reasonably have expected the injury to occur as a result of his intentional act, it was held that if the injury was unexpected from the standpoint of the claimant, it was caused by accident within the coverage afforded the insured under the policy. The definition of "occurrence" in the new policy requires that the bodily injury or property damage must be "neither expected nor intended from the standpoint of the insured." In addition to enforcing the original intent with respect to injury intentionally caused by the insured, the definition eliminates the need for the assault and battery condition.

#### Property Damage Liability Insurance

A principal source of contention under the current policy between insureds and the insurance companies, which frequently led to litigation, involved the scope and extent of the coverage provided under the policy for property damage liability. Even the insurers were not in agreement among themselves as to the scope and extent of the property damage liability insurance afforded under the policy. Some insurers contended that the property damage coverage afforded by the policy was limited to the insured's liability for physical damage to tangible property which was not otherwise excluded. Thus, they attempted to deny coverage where the only tangible property which was physically damaged was the insured's property which was excluded, although the insured was liable for damages for loss of use of other property which resulted from the physical damage to his own property. For example, if the insured's crane broke down in front of the door of a supermarket and prevented access to the supermarket by its customers, they attempted to deny coverage for the insured's liability to the supermarket for damages for loss of business sustained by the supermarket while access to it was blocked.

On the other hand, some insureds have insisted that the current policy provides coverage for their liability to customers for loss of future profits and good will, and other damage to intangible property and property rights, although there was no damage to any tangible property other than the insured's tangible property. For example, the manufacturer of the crane which broke down in front of the supermarket would contend that the current policy covers his liability to the contractor for damages sustained by the contractor on account of loss of use of the crane while the crane was out of operation.

The new policy attempts to define and clarify the extent and scope of the property damage liability coverage. It does this by defining the terms "damages" and "property damage." The definition of "damages" provides in part that "Damages includes . . . damages for loss of use of property resulting from property damage." The term "property damage" is defined to mean "injury to or destruction of tangible property."

Whereas the current policy covers the insured's liability for injury to or destruction of undefined property, the new policy specifically applies to "tangible property." Does this represent a restriction or a broadening of coverage? Some of those who have reviewed the new policy have taken the position that since the current policy covered injury to or destruction of undefined property, the introduction of the word "tangible" represents a restriction in coverage. On the other hand, some company spokesmen contend that the broader "occurrence" coverage together with a definition of "property damage" which does not limit the coverage to physical injury to or destruction of tangible property, represents a broadening of coverage. They point out that the "occurrence" endorsements used by many companies under the current policy to provide the broader "occurrence" coverage when requested by an insured limited the broader "occurrence" coverage to apply to physical injury to tangible property. It is interesting to note, however, that the "Explanatory Memorandum of Changes" prepared by the Bureau had this to say about the definition of "property damage":

*This definition, together with the definition of 'damages', is intended to produce the same effect as present policies. (Emphasis added) The definition limits coverage to legal damages for injury to tangible property. Mere loss of profits from an unsuccessful venture are not covered. But, of course, damages for injury to tangible property include as before, damages for its loss of use.*

I do not think that the use of the word "tangible" in defining "property damage" has the effect of restricting coverage under the new policy as compared to that afforded under the current policy which provides coverage for damage to undefined property. Certainly, the underwriters did not intend under the current policy to provide coverage for damage to intangible property, such as loss of profits, good will, property rights, etc., if there was no injury to covered tangible property which caused such indirect damage. I know of no court decisions which gave such a broad interpretation to the current policy. Whether the new policy represents a broadening of coverage over the current policy depends on how the companies interpreted the current policy. Certainly, it will mean a broadening of coverage for those companies which interpreted the current policy as limiting coverage to physical injury to tangible property, or which used occurrence endorsements specifically requiring physical injury to tangible property. It will not represent a broadening of coverage for those companies which may have interpreted the current policy to provide coverage for injury to tangible property without the requirement that the tangible property be physically injured.



Let us go back to the illustration of the crane which broke down and blocked access to the supermarket. Under the current policy, there was a difference of opinion as to whether the supermarket sustained damages because of injury to or destruction of property to which the policy applied because there was no physical injury to tangible property other than the insured's crane. Of course, if the crane had toppled over and damaged the entrance to the supermarket so as to prevent ingress, there would have been coverage under the current policy for the physical injury to the building as well as coverage for the consequential damages resulting therefrom. Under the new policy it would seem obvious that there is coverage in this case because there is injury to the supermarket when access to it is blocked, even though there may be no physical injury to the supermarket. On the other hand, it would seem obvious under the new policy that the crane manufacturer has no coverage for his liability for damages to the crane owner on account of loss of use of the crane because with respect to such damages there was no injury to tangible property other than the crane, which is excluded.

A few more illustrations might be helpful in understanding the difference between the property damage liability coverage afforded under the current policy and the new policy.

A sewer contractor negligently cuts an underground power line. Among those who are without power for 48 hours are a cold storage locker plant and a manufacturing plant. Perishable foods in the cold storage locker plant are damaged. The manufacturing plant is required to shut down for 24 hours because of lack of power. With respect to the cold storage locker plant, there is physical injury to tangible property. Under the current policy there was no question but that there was coverage for the sewer contractor's liability to the locker plant for such damage. The factory, however, has not sustained physical injury to tangible property. However, it does sustain damages because of loss of use of the factory for the 48-hour period. Under the current policy there was a difference of opinion among insurers as to whether there was coverage for the sewer contractor's liability to the factory owner. Under the new policy, there would appear to be coverage for such damages because the factory is tangible property which is injured when it is forced to shut down.

A resort located on a river suffers loss of business when a chemical plant upstream discharges waste material into the river which causes an odor downstream at the resort. Here again, there is no physical injury to the resort. However, the resort is tangible property and it would be difficult to argue that it has not been injured. Under the current policy there was a difference of opinion among insurers as to whether or not there was coverage for the damages sustained by the resort owner. Under the new policy coverage would appear to be afforded.

Whether or not the new policy provides broader coverage in this area of property damage liability insurance is of less importance than the fact that the new policy should result in more consistent treatment of claims by insurers using the new standard policy. It should also eliminate many of the troublesome areas which were increasingly becoming a prolific source of litigation between the insurance company and the insured.

### Automobile Coverage

There have been some important changes in the new Comprehensive General Liability Policy in connection with automobile coverage. The automobile exclusion in the current policy was limited in its application to accidents which occurred away from premises owned by, rented to or controlled by the named insured, or the ways immediately adjoining. Thus, the current policy, although not an automobile liability policy, provided automobile liability coverage for automobile accidents occurring on the named insured's premises. This resulted in overlapping coverage under the named insured's automobile policy and his comprehensive general liability policy. Where the insured carried his automobile and general liability insurance in different companies, the two companies frequently became involved in "action over" litigation to determine which company would take care of an "on premises" automobile accident. With two exceptions, the automobile exclusion in the new policy applies to automobile liability both on and away from the insured's premises. It was felt that automobile coverage should more appropriately fall under an automobile policy. Thus, there will no longer be an overlapping of coverage between the automobile policy and the Comprehensive General Liability Policy.

The first of the exceptions referred to relates to operations performed by independent contractors. The insured's automobile liability arising out of operations performed by independent contractors will continue to be covered under the new policy. This means that loading and unloading of independent contractors' automobiles by the insured is covered under the new policy both on and away from premises. Under the current policy, loading and unloading of independent contractors' automobiles by the insured was covered only if the accident occurred on the insured's premises. The second exception relates to parking of automobiles on the insured's premises. The automobile exclusion in the new policy does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobile is not owned by or rented or loaned to the named insured. Thus, as in the case of automobiles belonging to guests or tenants in connection with office buildings, hotels, restaurants, clubs, etc., coverage will be continued to be provided under the new policy.

The automobile exclusion in the current policy contains an exception with respect to liability assumed by the insured under any contract or agreement. That exception has been eliminated in the new policy since it is not intended that coverage be provided for contractual liability with respect to automobiles except as respects operations of independent contractors for the insured.

The new policy also more clearly distinguishes between automobiles which are not to be insured under the policy and other equipment which is generally insured under a general liability policy. The policy defines two types of vehicles—automobiles and mobile equipment. The term "automobile" is defined to mean a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment. The



term "mobile equipment" is defined to include the many special-purpose vehicles which are not subject to motor vehicle registration, or are maintained for use exclusively on premises owned by or rented to the named insured, or are designed for use principally off public roads, or are designed or maintained for the sole purpose of affording mobility to equipment such as power cranes, shovels, loaders, etc. It is intended to cover "mobile equipment" under the new Comprehensive General Liability Policy. With respect to mobile equipment which is covered under the new policy, the policy provides so-called "omnibus coverage" so as to permit it to be certified under the various financial responsibility laws.

### **Liquor Law Liability Exclusion**

The current Comprehensive General Liability Policy contains a "liquor law liability" exclusion which provides that the policy does not apply to liability imposed upon the insured or any indemnitee, as a person or organization engaged in the business of manufacturing, selling or distributing alcoholic beverages, or as an owner or lessor of premises used for such purposes, by reason of any statute or ordinance pertaining to the sale, gift, distribution or use of any alcoholic beverage. It will be noted that this exclusion is limited to liability imposed by statute or ordinance. At the time this exclusion was inserted in the policy, there was no common law liability for serving intoxicated individuals. However, some jurisdictions have recently imposed such liability on the basis of common law. Consequently, the exclusion in the new policy has been broadened to exclude common law as well as statutory liability. It should be noted, however, that the exclusion is still limited in its application to those engaged in the business of dispensing alcoholic beverages and would not apply, for example, in a case where the insured holds a cocktail party for its agents, distributors or customers.

### **Third-party Beneficiary Exclusion**

The so-called "third-party beneficiary" exclusion in the current policy has been eliminated in the new policy. This exclusion provides that the policy does not apply "to any obligation for which the insured may be held liable in an action on a contract or an agreement by a person not a party thereto." This exclusion was originally intended to prevent insurance for assumption of absolute liability by the insured with respect to persons with whom the insured had no contractual relationship and to whom the insured would not otherwise be liable. For example, a contractor installing sewers for a municipality would agree with the municipality to indemnify and save harmless anyone who sustained any damage whatsoever arising out of or in connection with his operations, regardless of negligence on his part. As worded, the exclusion was much broader than originally intended. For example, it operated to exclude coverage in a case where the insured subcontractor's contract with the general contractor provided that the subcontractor would indemnify and hold harmless the owner. Furthermore, it was determined that the situations for

which the exclusion was originally intended did not occur as frequently as had been anticipated. Therefore, the exclusion was deleted in the new policy.

### Defense

The "defense" provision of the current comprehensive general liability policy is contained in a separate insuring agreement captioned "Defense, Settlement, Supplementary Payments." It provides in part that:

With respect to such insurance as is afforded by this policy, the company shall:

- (a) defend any suit against the insured alleging such injury, sickness, disease or destruction . . .

It has always been the intent of the underwriters and the policy drafters that the obligation to provide a defense for the insured ceased upon exhaustion of the limits of liability. Thus, for example, if the policy contained a \$20,000 limit per accident and the company settled or paid judgments on two claims arising out of the accident in an amount equal to \$20,000, it was not obligated to provide a defense for the insured in connection with a third claim arising out of the same accident. The reason for not defending claims against the insured after the limits of liability have been exhausted is that the insurance company no longer has an interest in the litigation, and to provide a defense in such cases would be against public policy as being practice of law by a corporation.

The courts have not always interpreted the defense provision as intended by the underwriters and the policy drafters. Some jurisdictions have held that a company's obligation to defend continues after exhaustion of limits. Editorial changes in this insuring agreement were made in previous revisions of the policies to more clearly set forth this intent. Thus, the latest revision of the current Comprehensive General Liability Policy adopted the "with respect to such insurance as is afforded by this policy" approach. The theory was that if the limits of liability were exhausted, no insurance was afforded by the policy with respect to pending claims arising out of the same accident and, consequently, there was no obligation to defend such claims. This approach did not prove completely satisfactory, and some doubt still remained on the question of the company's obligation to defend claims arising out of the same accident after it had exhausted its liability under the policy. Even defense counsel were not convinced that the insuring agreement clearly and adequately set forth the intent.

Any doubt that the company is not obligated to defend its insured after it has exhausted its limits of liability has been eliminated in the new Comprehensive General Liability Policy. The company's obligation to defend has been made a part of the statement of coverage, as in the standard Family Automobile Policy, in order to express more clearly the intent that the obligation to defend is not a separate and independent insuring agreement. The statement of the company's obligation to defend contains the additional qualification that, "The company shall not be



obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."

Some of those who have reviewed the new policy have taken the position that the additional language represents a "cutback" or restriction in coverage. I want to emphasize that this is not correct. As I have indicated, the new language expresses what was the intent under the current policy.

One state insurance department which has not as yet approved the filing of the new policy has objected to the clause clarifying the company's obligation to defend after exhaustion of limits. This department has commented as follows:

If the proposed clause were to be adopted, the insurer would have no obligation to provide the insured with a defense against a lawsuit brought by the outstanding claimants. It would, therefore, follow that the total responsibility and the full financial burden of a court defense would fall squarely upon the insured.

Although this insurance department may not look with favor upon what has been done, their comment does indicate that the policy drafters have finally expressed the intent in clear and unequivocal language. This same state insurance department made the following additional comment regarding the new language:

The sweeping language of this clause fails to place upon the insurance company a duty of good faith payments. The clause declares in no uncertain terms that as soon as the insurer pays out the limits of the policy, it automatically relieves itself from the duty to defend the insured.

The implication of this comment is that under the new language the companies will change their claim practices. However, since the new language merely expresses more clearly what the intent of the underwriters has been in the past, I doubt very much whether you will see much of a change in claim practices of the companies because of the new language. I don't think that you will see many companies initiating a practice of quickly paying out their limits of liability in a case involving questionable liability on the part of the insured, low limits of liability, numerous claimants and the prospect of expensive litigation, in order to avoid the expense of defense. Nor will you find companies attempting to turn over the defense of a lawsuit to the insured in the middle of a lawsuit. In handling these situations, the companies will have to act in good faith and keep the interests of the insured in the proper perspective. Certainly, if the actions of the company in these situations prejudice their insureds, they will be required by the courts to pay all claims and costs of defense irrespective of limits of liability.

#### Inspection and Audit

I think that most of you are familiar with the *Nelson v. Union Wire Rope Corporation*, 199 N.E. (2d) 769, in which the Supreme Court of Illi-

nois held that a workmen's compensation insurer is liable for negligently inspecting its insured's premises. Actions were brought on behalf of employees of a subcontractor and the general contractor who were injured or killed when a temporary construction hoist failed on a construction job, against the workmen's compensation insurer for the general contractor. The plaintiffs claimed that the insurance company, having gratuitously undertaken to make safety inspections of the practices and equipment of the general contractor, was liable for having carelessly and negligently performed those inspections. The insurer was found guilty of negligence in performing its inspection services. The court held that by undertaking to act in making the inspections, the insurance company subjected itself to the duty to make the inspection properly, and that reliance by either the plaintiffs or the contractor was not a necessity to holding the insurance company liable. The following excerpts from the dissenting opinion in the *Nelson* case illustrate the problems insurers were faced with as a result of the majority decision:

The result is that an insurer who makes supplemental inspections, designed to minimize potential losses by diminishing the likelihood of injury, is penalized by the imposition of full responsibility for all losses that might have been revealed by the most complete inspection, even though no one concerned relied upon the insurance company for complete inspection.

The opinion, thus, apparently announces a kind of 'all or nothing' rule of law which will frustrate the possibility of limited inspection services by requiring that if any inspections are undertaken, complete inspections must be made.

Under the stringent rule adopted by the majority, no insurer will hereafter dare to offer to perform, or perform, limited inspection services for fear of incurring liability. Undoubtedly such services, though limited, have contributed to the safety of workers and prevented economic loss. Sound policy would seem to dictate that the kind of service rendered by this insurer should be encouraged rather than discouraged.

Since the *Nelson* decision, insurance companies have been beset with a flood of claims alleging negligent inspection with respect to their safety and accident prevention services. In the new Comprehensive General Liability Policy, an attempt has been made to protect the company from liability such as that imposed on the company in the *Nelson* and other similar cases by revising the inspection and audit condition to read as follows:

The company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe.

The revised condition makes it clear that the company has no obligation to make inspections. Consequently, it should not be held liable for its failure to make inspections. With respect to inspections made by the company, the new condition attempts to relieve the company of responsibility by stating that they shall not constitute an undertaking, on behalf



respect to any amount of loss not so paid, the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each insurer has paid its limit in full or the full amount of the loss is paid. Under the "other insurance" condition of the current policy, the companies prorated the loss based on limits of liability. Thus, if the limit of liability of one company was \$25,000 and the limit of liability of the other company was \$50,000, the company with the \$25,000 limit would pay one-third of a \$10,000 loss, and the company with the \$50,000 limit would pay two-thirds of the loss. Under the new provision, each company would pay \$5,000 of the \$10,000 loss. The new condition provides a more equitable distribution of loss as between companies when more than one policy covers the loss.

It should be noted, however, that this "contribution by equal shares" under the new policy applies only if the other policy also provides for contribution by equal shares. If the other policy does not provide for contribution by equal shares, the pro-rata provision in the current policy is retained in order to avoid the gap or overlap in limits which would otherwise occur.

#### Insured's Duties in the Event of Occurrence, Claim or Suit

Finally, I should like to call your attention to a change in the condition which describes the insured's duties in the event of an occurrence, claim or suit. Frequently, the occurrence of a claim will call attention to the fact that other bodily injury or property damage may result from the same or similar conditions. It was intended, of course, that the insured would take such steps as were necessary to prevent further claims from occurring as a result of the same or similar conditions. Sometimes the company would have difficulty in persuading the insured to take the necessary action to prevent other claims, especially if such action was expensive. There is nothing in the current policy which specifically requires the insured to take such action. This defect has been remedied in the new policy. A provision has been added to the condition which provides that, "The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy." If the insured refuses to take such reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, such refusal would constitute a breach of the policy condition. Consequently, the company would not be liable under the policy for the bodily injury or property damage which arose out of the same or similar condition.

Before I turn this part of the program over to Mr. Gowan, who will explain the changes in the new Comprehensive General Liability Policy as they relate to products liability insurance, I should like to make a few general comments on insurance contracts.

In the case of *Maretti v. Midland National Insurance Company*, 199 NE (2d) 579 (Illinois, 1963), the court said:

... The policy contains such a bewildering array of exclusions, definitions and conditions that the result is confounding almost to the point of being unintelligible.

In *Peerless Insurance Company v. Clough*, 193 N. (2d) 444 (New Hampshire, 1963), the court said:

In summary, the plaintiff gave the defendant coverage in a single, simple sentence easily understood by the common man in the marketplace. It attempted to take away a portion of this same coverage in paragraphs and language which even a lawyer, be he from Philadelphia or Bungy, would find it difficult to comprehend.

I am sure that those of you who have represented either an insurance company or an insured on a question involving policy interpretation have had occasions to agree with the comments of these judges. I have been frequently asked by policyholders, insurance brokers, salesmen, counselors and advisors, insurance department personnel and even by my fellow lawyers, who are engaged in the general practice of law, when the insurance companies are going to write an insurance policy which is brief, simple, concise and in laymen's language so that the ordinary person can read it and understand it. My answer is that they probably will have to wait until a certain place freezes over before that happens. An insurance contract is not a written document—it is a manufactured document. It is a highly technical contract. Admittedly, it is not good for poor reading for the average layman and, frankly, it was not designed to be read or necessarily to be understood by laymen. We know that our policies are going to be read and interpreted more often by lawyers and the courts than by the insured. I am sure that when you prepare a contract for a client, you attempt to handle all of the contingencies which might arise under the contract, and in doing so, you do not necessarily use so-called "everyday English." And you have an advantage in preparing such contracts which policy drafters do not have in that you are preparing a tailor-made contract to fit an existing factual situation. Insurance contracts generally are not tailor-made—they are ready-to-wear! If the insurance companies had their lawyers draft a special insurance contract to fit the needs of each risk which they insure, the legal expense in preparing such contracts would be prohibitive. Thus, policies such as the standard policies must be prepared to fit a variety of situations involving thousands of insureds. It follows that all of the clauses and provisions in the policy will not fit all insureds. Also, because of the variety of risks covered under the single standard policy we must necessarily attempt to provide for as many of the unknown contingencies as possible. The revised general liability policies are no exception. I am afraid that the comments of the Illinois court in the *Maratti* case apply to the new policy as well as the current policy. I would hope, however, that the comments by the New Hampshire court in the *Peerless Insurance Company* case will be less applicable to the new policy than the old policy.



## EXHIBIT C

COMBINATION  
Comprehensive General & Automobile Liability  
Specification

*for Primary program*  
*OK*

## 1) Name of Insured

Diamond Shamrock Corporation and All Other Corporations or other business Entities owned or financially controlled by or subsidiary to Diamond Shamrock Corporation.

It is agreed, notwithstanding the above, such insurance as is afforded herein does not apply to the following companies as named insureds:

- 1) Insecticidas Diamond Del Pacifico, S.A. De C.V.
- 2) Insecticidas Y Fertilizantes Diamond Del Norte, S.A.
- 3) Diamond Chemicals De Mexico, S.A. De C.V.
- 4) Insecticidas Diamond De Michoacan
- 5) Insecticidas Diamond De Chihuahua
- 6) Pickands-Mather & Co.

## 2) Limits of General Liability

Bodily Injury Liability \$250,000/500,000/2,000,000 Annual Aggregate Products  
Property Damage Liability \$250,000/1,000,000 Annual Aggregate, separately for operations, Protective, Products and completed operations and Contractual Liability.

*2-17-72*  
*We provide actual loss only*  
*J.B. Brown*

## Limits of Auto Liability

Bodily Injury Liability \$250,000/500,000  
Property Damage \$250,000  
Medical Payments \$500 per person for any owned, leased, licensed private passenger automobile.  
Note: General and Auto Liability limits apply separately

## 3) Blanket Contractual Coverage (Oral or written)

With submission to Company not required with the following Bureau Contractual Exclusions deleted:

- What are these?*
- C1 (1) (11) C2 (1) & (11)
  - E) Liquor Law Liability
  - G) Third Party Beneficiary
  - J) Failure to perform with respect to work completed for the named insured with respect to a mistake, or deficiency in any design, formula, plan, specification etc. This exclusion is to be deleted provided insured is held harmless by Third Party responsible for design, formula plan, specification etc.
- 3?*

24) Written notice given to the company or any of its authorized agents as soon as practicable after the accident becomes known to the Insurance Department of Diamond Shamrock Corporation shall be sufficient compliance with notice of accident provision of this policy. ✓

25) Subrogation Provision should be extended by the following additions:

Provided however, the company shall not exercise any rights of recovery against

- NC {
- A) Any named insured or subsidiary companies owned by the named insured covered by this policy
  - B) Any person or organization in respect to which the insured has assumed such liability under contract or agreement
  - C) Any agent lessee, or lessor for whom insurance is provided by the company under this or separate policies.
  - D) Any employee of the named insured as respects claims arising out of automobile accidents

26) The second sentence of Condition 11 Cancellation is amended to read: ✓

This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than 60 days thereafter such cancellation should be effective. ✓

27) It is agreed that the words "Executive Officers" as used in this policy shall include all officers elected or appointed in accordance with the charter and by laws of corporations included as named insureds in the policy. ✓

28) The terms of this policy including limits of liability apply separately as respects premises and elevators insured hereunder. ✓

29) It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, Property Damage Liability and for Automobile Medical Payments with respect to any automobile hired under long term lease, and for which automobile, the named insured has agreed to provide such insurance applies to the owner or lessee, other than the named insured of such automobile and to any agent or employee of such owner or lessee as insured but only while the automobile is used in the business of the named insured as stated in the declarations or by or on behalf of the named insured for personal or pleasure purposes. ✓

It is further agreed, that such an automobile shall be deemed an owned automobile for the purposes of the other insurance clause of the policy.



30) Special Automobile Endorsement #3 and 9 per schedule attached.

31) Policy Exclusions deleted

- a) Watercraft Exclusion "D"
- b) Higher Law Exclusion "F"
- c) Explosion, Collapse and Underground P.D. "O" 1,2,3.

32) Contractual Exclusion "F" Care, Custody and Control deleted with respect to agreements between insured and Chevron Oil Company and between insured and Gulf Oil Corporation and only as they relate to Driver - attended Terminal Agreements. This coverage applies to any other Driver - Attended Terminal Agreement made by the insured.

33) Saline Substance - Property Damage Exclusion - Endorsement 10 of schedule attached.

34) Underground Property Endorsement 11 of schedule attached.

35) Non Operators Legal Liability Endorsement #12 of schedule attached.

36) Non Operators Contractual Liability Endorsement #13 of schedule attached.

37) Special Joint Venture Endorsement #14 of schedule attached.

38) Broad Form Property Damage Endorsement #15 of schedule attached.

39) Garage Liability Hazard I and II Coverage at 3420 W. 15th Amarillo, Texas, and 10704 N. May Avenue, The Village, Oklahoma \$35,000 Payroll each location.

40) Garage Keepers Legal Liability, Fire, Theft and \$100 Deductible Collision 15 vehicles \$10,000 limit at each of locations mentioned in #40 above.

Automatic Coverage at above limits will be extended to cover any newly acquired locations for the period of time that such locations are actually owned, operated and controlled by the insured.

41) Paragraph (A) of Condition #4 insured duties in the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the named and addresses of the insured and of available witnesses shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. The named insured shall promptly take at his own expense all reasonable steps to prevent additional Bodily Injury or Property Damage from arising out of the same or similar conditions at the same location where the initial

Bodily Injury & Property Damage occurred; provided (1) that failure to take such preventive measures shall not constitute a breach of this condition unless the company has requested the insurance department of Diamond Shamrock Corporation in writing to undertake such preventive measures and that a reasonable amount of time be allowed for compliance (2) such expense shall not be recoverable under this policy.

- 42) It is agreed that Item III limits of Liability (COL) are amended to include the following as respects products liability for bodily injury and property damage coverage:

All such damage arising out of one lot of Goods or Products prepared or acquired by the named insured or by another trading under his name shall be considered as arising out of one occurrence.

- 43) Care, Custody, Control Non-Owned Vehicles  
It is agreed that any vehicle not owned by the insured shall not be deemed to be in the care, custody or control of the insured while in any parking area owned by or leased by the insured in connection with loading or unloading operations.
- 44) Removal of Wreck Coverage - See Endorsement #16 attached.
- 45) Drive other car coverage for all employees who use company owned or leased vehicles.
- 46) Rejection of Uninsured Motorists coverage in all states where rejection is allowed. Insured will supply a letter of Intent where necessary.
- 47) Item IIc, Persons Insured, of Comprehensive Automobile Portion is to be amended with respect to bodily injury or property damage arising out of the loading or unloading thereof to apply only to the named insured and an employee of the named insured.
- 48) Exclusion Oil Pollution Endorsement #17 attached and Standard Bureau Pollution Endorsement #18 attached.
- 49) Primary Guaranteed Cost Policy for Diamond Shamrock Corporation Employees Recreation Association \$100/~~100~~/100,000 B.I. and \$100/100,000 Comprehensive General - Auto Liability - including Products and Blanket Contractual Personal Injury ABC- Hired Car and Non Ownership owned or leased vehicles on an if any basis.
- 50) Additional Interest - Humble Leasing Co. 1767 Morris Avenue, Union, N.J. and G.B. Anderson Rental Co. as respects vehicles leased to Diamond Shamrock Corp. et al.
- 51) Comprehensive General Liability Exclusion (K) is amended to eliminate therefrom the words "Bodily Injury"



- 52). Exception to Item 3 Provision 1 on 22 is Oil Insurance Limited policy covering Diamond Shamrock Oil & Gas Company policy for period January 1, 1972 to December 31, 1972 and any renewal thereof.

6/10/1904

A) ANY MUNICIPALITY WITH RESPECT TO PERMITS, HOWEVER CONSTRUCTION, ERECTION, EXISTENCE, MAINTENANCE, REPAIR OR REMOVAL OF ANY ADVERTISED SIGNS, POSTERS, GRAPHS, CELLAR ENTRANCES, CORE HOLES, DRIVEWAYS; BARBERS; HANDS, SIDEWALK ELEVATORS OR ROISTERY OPENINGS OR SIDEWALK VAULTS OR SIMILAR EXPOSURES, PROVIDING SUCH IDENTITY REQUIRES THE BAIRED INSURED TO FURNISH INSURANCE ON BEHALF OF SUCH MUNICIPALITY.

C) OWNERS, LESSEES AND/OR LESSORS OF ANY PREMISES ON OR FROM WHICH MAY BE HUNG ADVERTISING SIGNS, BULLETINS, PLACARDS OR STREET BANNERS USED IN CONNECTION WITH THE RATED HOUSED FOR THE PURPOSE OF ATTRACTING PATRONAGE SOLELY WITH RESPECT TO LIABILITY ARISING OUT OF SUCH ADVERTISING SIGNS, BULLETINS, PLACARDS OR STREET BANNERS.

D) ELECTIVE OR APPOINTIVE OFFICERS OR MEMBERS OF BOARDS OF COMMISSIONS OF PUBLIC AND MUNICIPAL CORPORATIONS OR AGENCIES, WHERE SUCH CORPORATIONS OR AGENCIES ARE INCLUDED AS INSURED'S UNDER THIS POLICY, WHILE ACTING WITHIN THE SCOPE OF THEIR DUTIES AS SUCH.

-CONTINUED-

(The information label is repeated only when this subdocument is used as separate information of job.)

Endorsement No.

Return Premium: 6

The Zina Cigar Co. and Cigar Company

## The Founding First in Order of Company



F) ANY LESSOR OR LESSOR WHERE THE LEASE PROVIDES THAT THE LESSEE INSURED WILL FURNISH INSURANCE BUT ONLY TO THE EXTENT OF THE INSURANCE PROVIDED BY THIS POLICY.

F) THE ADDITIONAL PREMIUM FOR THE COVERAGE AFFORDED BY THIS ENDORSEMENT FOR ANY LESSEE OR LESSOR IS TO BE DETERMINED IN ACCORDANCE WITH THE COMPANY'S RULES, RATES AND RATING PLANS APPLICABLE.

2. IT IS FURTHER AGREED THAT THIS INSURANCE DOES NOT APPLY

- A) TO STRUCTURAL ALTERATIONS, NEW CONSTRUCTION OR DEMOLITION OPERATIONS PERFORMED BY OR FOR SAID ADDITIONAL INSURED;
- B) TO LIABILITY ASSUMED BY SAID ADDITIONAL INSURED UNDER ANY CONTRACT OR AGREEMENT.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(This formula takes a report only when the instrument is issued when part is preparation of policy.)

Endowment No.

**Excella Ecomat**

The Zina Cigarette and Cigar Company

The *Journal of the American Statistical Association*

Continued

[illegible]

ADDITIONAL INTERESTS COVERED  
ENDORSEMENT APPLIED

IT IS AGREED THAT SUCH INSURANCE AS IS AFFORDED BY THE PROVISIONS OF THE FOREGOING CAPTIONED "ADDITIONAL INTERESTS COVERED" SHALL ALSO APPLY WITH RESPECT TO:

RATIONAL LIFE INSURANCE COMPANY

WITH RESPECT TO

4701 PACEBOCK ROAD, CINCINNATI, OHIO

**Figure 1**

651 TONNELL AVENUE, JERSEY CITY, N.J.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information is *irrelevant* when this information is *not* relevant to prediction of *phly*.)

Endorsement effective

Policy No.

Endorse on No. 4 (1)

310

Additional Premium \$

Return Premium \$

The Alpha Guaranty and Surety Company  
The Standard Fire Insurance Company

Continued from p. 102

## Conclusions



The China Carriage and Cycle Company  
The Standard Life Insurance Company

*[Signature]*

[illegible]

Belmont, N.Y.

SPECIAL (10-5)

AS A CONDITION OF THE COMPANY'S ASSUMING OF THE POLICY, THE INSURED  
 AGREES AND AGREES WITH THE COMPANY THAT SUCH INSURANCE AS IS AFFORDED  
 BY THE POLICY APPLIES SUBJECT TO THE FOLLOWING PROVISIONS:

THE INSURANCE WITH RESPECT TO ANY PERSON OR ORGANIZATION OTHER THAN THE NAMED INSURED AS PROVIDED BY RULE 11, OF COL. PART DOES NOT APPLY TO ANY PERSON OR ORGANIZATION, OR TO ANY AGENT OR EMPLOYEE THEREOF, IF SUCH PERSON OR ORGANIZATION HAS ENTERED INTO ANY AGREEMENT TO IDENTIFY THE NAMED INSURED FOR ACCIDENTS ARISING OUT OF THE USE OF AUTOMOBILES COVERED BY THE POLICY PROVIDED, HOWEVER, THAT THE PROVISIONS OF THIS ENDORSEMENT SHALL NOT APPLY IF IN CONFLICT WITH ANY STATUTE OR RULE OF LAW.

OK

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of policy unless otherwise stated herein.

(The information below is required only when the addendum is issued in response to preparation of policy.)

Insufficiently effective

Policy No.

Reference No.

14.

Received: January 1, 1964

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* on the substrate.

The Fidelity and Surety Company

The Standard Life Insurance Company

Co. 3000 114

Udvalgte af de 1000 personer



[illegible]

## SPECIAL ADVERTISING SECTION

IT IS AGREED THAT THE POLICY TO WHICH THIS ENDORSEMENT IS ATTACHED  
EXTENDS TO COVER AN ADDITIONAL NAMED INSURED:-

INVESTIGACION Y REALIZANTES DIAMOND DEL NORTE, SA (INCORPORADA)

ASSOCIATION DIAMOND BELGIUM/BRUXELLES

DIAMOND CHEMICALS DE MEXICO S.A. DE C.V.

INSECTICIDAS DIAMORO DEL PACIFICO, SA DE CV.

DIRECTIOŃAS DIARROE DE NICHOLSON

AS RESPECTS VEHICLES OWNED BY THEM WHICH ARE LOCATED IN MEXICO BUT WHICH ON OCCASION MAY ENTER THE UNITED STATES ON A TEMPORARY BASIS

IT IS FURTHER AGREED THAT THIS COVERAGE APPLIES IN THE UNITED STATES AND CANADA BUT DOES NOT PROVIDE ANY COVERAGE WHILE IN THE COUNTRY OF MEXICO.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is reported only when the end-user is interested in a page to preparation of policy.)

### Endorsement effective

Policy No.

Endorsement No. 16

**Name Insured**

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Karen Peterson 3

The Zinn Casket and Casket Company

**The Standard Life Insurance Company**

Countersign! by

(Continued from page 10)

A. E. Long

ENDORSEMENT TO POLICY OF THE INSURANCE COMPANY  
 PROVIDING FOR THE INSURANCE COMPANY'S LIABILITY  
 FOR THE PROPERTY DAMAGE

PROVIDE FOR THE PROPERTY DAMAGE CONTROL

It is agreed that extension of the policy is replaced by the following:

1. Property Damage

- (1) property owned, or occupied by or rented to the insured, or held by the insured for sale or contract to the insured for sale or contract to the insured;
- (2) any, while subject to liability under a written contract, agreement or the use of conveyances to:
- (a) property while on premises owned by or rented to the insured for the purpose of having operation performed on such property by or on behalf of the insured;
- (b) tools or equipment while being used by the insured in performing his operations;
- (c) property in the custody of the insured which is to be installed, erected or used in construction by the insured;

(iv) that particular part of any property, not owned by or rented to the insured;

- (a) upon which extension is being performed, on behalf of the insured at the time of the property damage arising out of such operation;
- (b) out of which any property damage arises;
- (c) the restoration, repair or replacement of any broken article or its necessary by means of workmanship thereon by or on behalf of the insured;
- (d) but parts (a), (b) and (c) of this extension do not apply to the insured's property or products or insured lawfully acquired physical goods or products to others, or (2) where the property damage arises out of the completed operation hazard;
- (v) property which is being transported by the insured by automobile, trailer or equipment or including the loading or unloading thereof.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No.

Named insured

THE CHINA CASUALTY AND SURETY COMPANY  
 THE STANDARD FIRE INSURANCE COMPANY  
 Hartford, Connecticut

Counter signed by



98a																													
<table border="1"> <tr> <td colspan="2">NAME OF INSURED</td> <td colspan="2">ADDRESS</td> <td colspan="2">CITY</td> <td colspan="2">STATE</td> <td colspan="2">ZIP</td> </tr> <tr> <td colspan="2"></td> <td colspan="2"></td> <td colspan="2"></td> <td colspan="2"></td> <td colspan="2"></td> </tr> </table>										NAME OF INSURED		ADDRESS		CITY		STATE		ZIP											
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COVERAGE		AMOUNT		RATE		TERMS		REMARKS																					

### ADDITIONAL INSURED-EMPLOYEES ASSOCIATION

IT IS AGREED THAT THE NAME OF INSURED ENDORSEMENT IN AMENDED TO INCLUDE "DIAMOND SHAMROCK EMPLOYEES RECREATION ASSOCIATION"

IT IS FURTHER AGREED THAT WITH RESPECT TO THIS ADDITIONAL INSURED SUCH INSURANCE AS IS AFFORDED BY THE POLICY WILL NOT APPLY TO:

1. POWER OPERATED MECHANICAL AMUSEMENT DEVICES BY OR UPON WHICH PERSONS MAY BE CARRIED OR MOVED, WHICH ARE OWNED, RENTED, MAINTAINED OR LEASED BY THE INSURED, OR AS TO WHICH THE INSURED HAS THE RIGHT TO EXERCISE SUPERVISION OR CONTROL;
2. THE CONDUCT OR SPONSORING OF HORSE SHOWS, HORSE RACES, CIRCUSES, CARNIVALS, BOXING OR WRESTLING EXHIBITIONS, SOAPBOX DERBIES, RODEOS, OR MOTORCYCLE OR AUTOMOBILE RACES OR EXHIBITIONS;
3. THE ERECTION, OWNERSHIP, OPERATION OR MAINTENANCE OF (A) IF OUTDOORS, ANY STADIUM, GRANDSTAND, BLEACHER, REMOVABLE TYPE SEATING STAND OR OTHER STAND DESIGNED FOR THE USE OF SPECTATORS, OR (B) IF INDOORS, ANY SEATING STAND ACQUIRED, STRUCTURALLY ALTERED OR ENLARGED AFTER THE EFFECTIVE DATE OF THIS INSURANCE, UNLESS WRITTEN CONSENT OF THE COMPANY PERMITTING SUCH ACQUISITION, ALTERATION OR ENLARGEMENT IS ENDORSED HEREON;
4. INJURY TO ANY PERSON WHILE PRACTICING FOR OR PARTICIPATING IN ANY ATHLETIC SPORT, GAME OR CONTEST, AWAY FROM PREMISES OWNED, RENTED OR CONTROLLED BY THE INSURED.
5. BODILY INJURY LIABILITY CLAIMS DUE TO THE RENDERING OF ANY PROFESSIONAL SERVICES OR THE OMISSION THEREOF.
6. THIS COVERAGE IS EXCESS OF ANY OTHER VALID AND COLLECTIBLE INSURANCE.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is reported only when this endorsement is attached to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 14

Named Insured

Additional Premium \$

INCL. IN COMPOSITE  
RATES

Premium Premium \$

EL

PD

In Advance \$

1st Adv. \$

2nd Adv. \$

The 2nd Casualty and Surety Company

1000

IN THE EVENT OF CANCELLATION, TEN (10) DAYS WRITTEN NOTICE BY REGISTERED MAIL WILL BE GIVEN TO COMMISSIONER OF PUBLIC SERVICE OF THE CITY OF MEMPHIS, TENNESSEE.

(The information below is required only when this information is not in support of preparation of policy.)

Endorsement No. 13

Return Address: S

Continued by

London, W.C. 2A, U.K.



DECLARATION OF WORKERS' COMPENSATION COVERAGE

WORKERS' COMPENSATION COVERAGE

- 1) Cover All States with exception of Monopolistic States, Arizona, Arkansas, Pennsylvania - and Texas Workmen's Compensation exposure
- 2) Employers Liability \$500,000
- 3) Additional Medical \$100,000 in states where applicable
- 4) Employers Liability Canada \$500,000 Indorsement #1 of Schedule attached
- 5) All States Indorsement with amendment to introductory clause and Sub Paragraph I as follows in the event the insured undertakes operations in any state not designated in Item #3 of the Declarations, The Company agrees as follows:
  - 1) To reimburse the insured for all compensation and other benefits required if the insured under the Workmen's Compensation or Occupational Disease Law of any state other than Nevada, North Dakota, Ohio, West Virginia or Wyoming.
  - 2) The Sub Paragraph #2 the words "Such State" mean any state not designated in Item #3 of the declarations.
- 6) Insuring Agreement Coverage B - Employers Liability is amended to read:
 

To pay on behalf of the Insured all sums which the insured shall become legally obligated to pay as damages because of Bodily Injury by accident or disease, including death at any time resulting therefrom, wherever such injuries may be sustained by any employee of the insured arising out of and in the course of employment by the insured either in operation in a state designated in Item #3 of the declarations or in other operation covered by this policy provided claim or suit is made in the United States of America, its territories and possessions and Dominion of Canada.
- 7) Defense Base Act coverage
- 8) Cover B extended to cover Masters and Members of crews of any vessel \$500,000 each employee) Bodily Injury by Accident  
 \$500,000 each accident)  
 \$500,000 each employee) Bodily Injury by Disease  
 500,000 aggregate disease)

10)

Voluntary Compensation

Bodily Injury by Accident

Each Employee \$500,000

Each Accident \$500,000

Bodily Injury Disease

Each Employee \$500,000

Aggregate Disease \$500,000

<u>Group of Employees</u>	<u>State of Operations</u>	<u>Designated V.C. Law</u>
All Executive Officers	U.S.A. its territories and possessions	State of Hire
All Employees engaged in any sports or recreational activities sponsored by the insured	U.S.A. its territories and possessions and Dominion of Canada	State or Province of Hire
All Employees	Washington	Washington
Substitute Employees, additional employees compensated by contribution from other employees and employees whose remuneration is based on gratuities	United States its territories and possessions and Dominion of Canada	State of Province of Hire
All Other Employees not subject to a Workmen's Compensation Act	United States of America its territories and possessions and Dominion of Canada	State or Province of Hire

11) Amendment of Voluntary Compensation Endorsement Athletic Teams Endorsement #2 of Schedule attached

12) Extension of coverage to include suits in an in Rem action against any vessel owned operated or chartered by the Insured shall in all respects be treated in the same manner as though the action resulting therefrom were "in personam" against the insured

13) Policy Condition 4 first sentence is amended to read - When an injury occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable after knowledge of such accident is had by the insurance department of the insured.



policy of days is added to days.

- 15) Foreign Coverage - Voluntary Compensation Endorsement  
 The policy applies under Coverage C to Injury or death sustained outside the United States of America, its territories or possessions or claims provided any claim or suit is instituted with the Continental United States of America.

<u>Group of Employees</u>	<u>State of Operations</u>	<u>Designated W.C. Law</u>
Employees domiciled and hired in United States assigned temporarily for duty outside the U.S.A. and Canada in the course of business of the insured	Worldwide except United States, its territories or possessions or Canada	State of Hire

The company hereby gives the insured notice that the undertaking incorporated in this endorsement does not and will not constitute legal insurance of the insured's obligation under the Workmen's Compensation Law of any Foreign Country or Political Sub-Division thereof. No penalty provided for failure to comply with any such compensation law is assumed by this endorsement.

- 16) Foreign Coverage Endorsement per Endorsement #3 attached

- 17) 1) Name of Insured

Diamond Shamrock Corporation and all other corporations or other business owned or financially controlled by or subsidiary to Diamond Shamrock Corporation.

It is agreed notwithstanding the above, such insurance as is afforded by the policy shall not apply to the following companies

- 1) Insectidas Diamond Del Pacifico S.A. De C.V.
- 2) Diamond Chemicals De Mexico S.A. De C.V.
- 3) Insectidas Y Fertilizantes Diamond Del Norte S.A.
- 4) Insectidas Diamond De Chihuahua S.A. De C.V.
- 5) Harte & Co. Inc. & Plicse Mfg. Co.
- 6) Pickands Mather Inc.
- 7) Insecticidas Diamond De Michoacan

- 15) Amount of Vote by Company for 1944 Operations  
 . . . Indorsement 54 attached

California Workmen's Compensation

- 1) Items 5, 13, & 14 above
- 2) U.S. Longshoremen's & Harbor Workers' coverage
- 3) Item 8 above      Limit B.I. by accident  
                              \$500,000 each employee  
                              1,000,000 each accident B.I. by Disease  
                              500,000 each employee  
                              1,000,000 Aggregate Disease
- 4) Item 12 above



## EMPLOYERS' LIABILITY ENDORSEMENT-CANADA

IT IS AGREED THAT SUCH INSURANCE AS IS AFFORDED BY THE POLICY UNDER COVERAGE B ALSO APPLIES TO BODILY INJURY (BY ACCIDENT OR DISEASE), INCLUDING DEATH AT ANY TIME RESULTING THEREFROM, SUSTAINED BY EMPLOYEES DOMICILED AND HIRED IN CANADA ASSIGNED TEMPORARILY FOR DUTY OUTSIDE CANADA IN THE COURSE OF THE BUSINESS OF THE INSURED."

WITH RESPECT TO SUCH INSURANCE AS IS AFFORDED BY THE POLICY UNDER COVERAGE B BY VIRTUE OF THIS ENDORSEMENT THE FOLLOWING ADDITIONAL PROVISIONS APPLY:

1. THIS ENDORSEMENT DOES NOT APPLY TO BODILY INJURY, INCLUDING DEATH RESULTING THEREFROM:

(A) ON ACCOUNT OF WHICH BENEFITS ARE PAYABLE UNDER THE WORKMEN'S COMPENSATION LAW OR ANY OCCUPATIONAL DISEASE LAW OF ANY PROVINCE OR PROVINCES OF CANADA

2. CONDITION 8 OF THE POLICY IS AMENDED TO READ AS FOLLOWS:

## LIMITS OF LIABILITY COVERAGE B

THE WORDS "DAMAGES BECAUSE OF BODILY INJURY BY ACCIDENT OR DISEASE, INCLUDING DEATH AT ANY TIME RESULTING THEREFROM", IN COVERAGE B INCLUDE DAMAGES FOR CARE AND LOSS OF SERVICES AND DAMAGES FOR WHICH THE INSURED IS LIABLE BY REASON OF SUITS OR CLAIMS BROUGHT AGAINST THE INSURED BY OTHERS TO RECOVER THE DAMAGES OBTAINED FROM SUCH OTHERS, BECAUSE OF BODILY INJURY SUSTAINED BY EMPLOYEES OF THE INSURED ARISING OUT OF AND IN THE COURSE OF THEIR EMPLOYMENT. (THE LIMIT OF THE COMPANY'S LIABILITY UNDER COVERAGE B IS \$500,000. FOR ALL DAMAGES BECAUSE OF BODILY INJURY BY ACCIDENT, INCLUDING DEATH AT ANY TIME RESULTING THEREFROM, SUSTAINED BY ONE EMPLOYEE IN ANY ONE ACCIDENT, AND, SUBJECT TO THE FOREGOING PROVISION RESPECTING EACH EMPLOYEE, THE TOTAL LIMIT OF THE COMPANY'S LIABILITY IS \$500,000. FOR ALL DAMAGES BECAUSE OF BODILY INJURY BY ACCIDENT, INCLUDING DEATH AT ANY TIME RESULTING THEREFROM, SUSTAINED BY TWO OR MORE EMPLOYEES IN ANY ONE ACCIDENT.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy)

Endorsement effective

Policy No.

Endorsement No. 18

Named insured

CONTINUED

Address of Premium

Return Premium \$

(1)

The Alpha Casualty and Surety Company  
The Commercial Fire Insurance Company

*F. E. Thompson*  
Contracted by

--CONTINUED--

THE INCLUSION HEREIN OF MORE THAN ONE INSURED, SHALL NOT OPERATE TO INCREASE THE LIMITS OF THE COMPANY'S LIABILITY.

#### 4. CLASSIFICATIONS, EXPOSURES AND RATES "TO BE DETERMINED" IF EXPOSURE DEVELOPS.

(The information below is reported only when this instrument is issued subsequent to preparation of policy.)

Endorsement No. 18

Return Premium 5

Counters ruled by



IT IS AGREED THAT, WITH RESPECT TO MEMBERS OF ATHLETIC TEAMS, SUCH INSURANCE AS IS AUTHORIZED BY THE POLICY AND SUPPLIED BY THE VOLUNTARY CONTRIBUTION PROGRAM, APPLIES SUBJECT TO THE FOLLOWING PROVISIONS:

- This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

Endorsement No. 9(A)

**Retail Premium \$**

Conceived by

(Continued on Page 10)

## FOREIGN COVERAGE ENDORSEMENT -CONTINUED-

WITH RESPECT TO SUCH INSURANCE AS IS AFFORDED BY THE POLICY UNDER COVERAGE B, INSURING AGREEMENT OF THE POLICY IS AMENDED BY THE ADDITION OF THE FOLLOWING PARAGRAPH:

IF CLAIM OR SUIT IS BROUGHT ELSEWHERE THAN WITHIN THE UNITED STATES OF AMERICA, ITS TERRITORIES OR POSSESSIONS OR CANADA, THE INSURED WILL UNDERTAKE THE INVESTIGATION AND DEFENSE, NOTIFYING THE COMPANY OF SUCH ACTION, AND WITH THE PRIOR CONSENT AND AUTHORIZATION OF THE COMPANY EFFECT SETTLEMENT WHERE WARRANTED. THE COMPANY AGREES, SUBJECT TO THE LIMITS OF LIABILITY STATED IN PARAGRAPH 6, TO REIMBURSE THE INSURED FOR ANY EXPENDITURES ARISING FROM LIABILITY IMPOSED UPON HIM BY LAW OR DAMAGED ON ACCOUNT OF SUCH INJURY OR DEATH AND IN ADDITION FOR SUCH LEGAL EXPENSE INCURRED IN CONNECTION THEREWITH AS WOULD OTHERWISE BE PAID BY THE COMPANY. THE COMPANY MAY, AT ITS DISCRETION, PARTICIPATE IN THE INVESTIGATION AND DEFENSE OF ANY SUCH CLAIM OR SUIT, EXCEPT WITH RESPECT TO ANY VOLUNTARY INFIRMITY, ACCIDENT AND SICKNESS INSURANCE CARRIED BY THE INSURED, THE INSURANCE AFFORDED HEREIN SHALL NOT APPLY. IF THE INSURED HAS OTHER VALID AND COLLECTIBLE INSURANCE IN FORCE AGAINST A LOSS COVERED HEREBY.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(All information herein is reported only when this endorsement is issued subject to signature of policy)

Endorsement effective

Policy No.

Endorsement No. 11

Named Insured

Additional Premium \$

Return Premium \$

This American Community and General Company

is a member of the American Community Group

*E. E. [Signature]*  
 General Agent



1. This endorsement is issued by one of the below named companies, forms a part of the policy to which attached, effective as of the inception date of the policy unless otherwise stated herein.
2. This endorsement is issued by one of the below named companies, forms a part of the policy to which attached, effective as of the inception date of the policy unless otherwise stated herein.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective as of the inception date of the policy unless otherwise stated herein.

*[The information below is required only when this endorsement is issued subsequent to inception of the Policy.]*

Endorsement Effective

Policy No.

Endorsement No. 10

Name of Insured

PREMIUM

Additional

Return \$

Countersigned

Authorized Agent

The Fire and Marine Insurance Company  
The Fire and Marine Insurance Company  
London, Connecticut 06115

Diamond Shamrock Corporation  
Comprehensive Auto Liability

Chemical Company including Harte & Company, Bel  
Chemical Company \* Napco Division

<u>Policy Period</u>	<u>Losses Incurred Subject to 50,000 Limit</u>	<u>Losses Excess of \$50,000</u>
2/1/67-68	24,031.00	-
2/1/68-69	76,115.00	* 57,853.00
2/1/69-70	30,276.00	-
2/1/70-71	33,727.00	-
2/1/71-8/10/71	12,615.00	-

Oil & Gas Company

<u>Policy Period</u>	<u>Losses Incurred Subject to 50,000 Limit</u>	<u>Losses Excess of \$50,000</u>
1968-1969	9,498.00	-
1969-1970	6,837.00	-
1970-1971	8,760.00	-
1971-8/10/71	177.00	-

Taylor-Evans Seed Co.

<u>Policy Period</u>	<u>Losses Incurred Subject to 50,000 Limit</u>	<u>Losses Excess of \$50,000</u>
1968-1969	5,992.00	-
1969-1970	12,411.00	-
1970-1971	1,500.00	-
1971-8/10/71	3,952.00	-

\* Loss \$100,000 B.I., \$5,638.00 P.D., \$2,215 Expense Auto accident  
 brakes failed



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
THE HOME INSURANCE COMPANY,

Plaintiff,

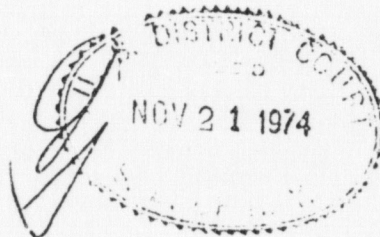
74 Civ. 4164 (RLC)

-against-

JOINT SUBMISSION

THE AETNA CASUALTY AND SURETY  
COMPANY and DIAMOND SHAMROCK  
CORPORATION,

Defendants.  
-----x



In connection with the motion and the two cross-motions for summary judgment before the Court, the undersigned jointly submit the within copy of the portions of the "Aetna Underlying Policy" to which reference has been made in the motion papers. A diagonal line has been drawn through those major portions of the within copy which had to be included, but to which no reference is made.

TOWNLEY, UPDIKE, CARTER & RODGERS

By

Philip D. B. [Signature]

A Member of the Firm  
Attorneys for Plaintiff

J. ROBERT MORRIS

By

[Signature]

A Member of the Firm  
Attorneys for Defendant Aetna

CADWALADER, WICKERSHAM & TAFT

By

[Signature]

A Member of the Firm  
Attorneys for Defendant  
Diamond Shamrock

COUNTERSIGNING CODES	OFF
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TRANSACTION TYPE	CA	D	MO-DAY-YR	ADD. INITIALS
	8			MRP/30

4 DUP POL ISS.

THE FARMERS' LIABILITY AND SURETY COMPANY

COMPREHENSIVE LIABILITY POLICY  
For

1. NAMED INSURED ► DIAMOND SHAMROCK CORPORATION  
1100 SUPERIOR AVE.  
CLEVELAND, OHIO 44114

POLICY NUMBER (Once Code—Symbol—Serial No.—Suffix)

01AL242750 SCA

2. POLICY PERIOD

From 2/1/74 to 2/1/75 12:01 A.M.  
Standard time at the address of the named insured as stated herein.

AUDIT PERIOD

Annual, unless otherwise stated:

(Show Number and Street or RFD, City, County, State and Zip Code)

INTERESTED PARTIES: ☐ Individual ☐ Partnership ☒ Corporation ☐ Joint Venture ☐ Other

BUSINESS OF NAMED INSURED: CHEMICALS & ALLIED PRODUCTS (MANUFACTURER)

3. The insurance afforded is only with respect to such of the following Parts and Coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Subject to all the terms of this policy having reference thereto.						
PART	COVERAGES	LIMITS OF LIABILITY				ADVANCE PREMIUM
		Each Person	Each Occurrence	Each Accident	Aggregate	
CAL	COMPREHENSIVE AUTOMOBILE LIABILITY INSURANCE					
	Bodily Injury Liability	\$ 250 ,000	\$ 500 ,000			AA \$ 18,604.
	Property Damage Liability		\$ 250 ,000			AP \$ 15,012.
CGL	COMPREHENSIVE GENERAL LIABILITY INSURANCE (Except Automobile)					
	Bodily Injury Liability		\$ 500 ,000		\$ 2000 ,000	\$ 74,030.
	Property Damage Liability		\$ 250 ,000		\$ 1000 ,000	\$ 150,310.
AMP	AUTOMOBILE MEDICAL PAYMENTS INSURANCE					
	Automobile Medical Payments	\$ 500.				AA \$ INCL IN
UM	INSURANCE AGAINST UNINSURED MOTORISTS					
	Damages for Bodily Injury	\$ SEE ,000		\$ FIFTY,000		AA \$ COMPOSITE
PHD	AUTOMOBILE PHYSICAL DAMAGE INSURANCE					
	1 Comprehensive	Insurance is afforded only with respect to such covered automobiles as are designated in the attached Automobile Schedule, subject to the limits of liability indicated therein.				AO \$
	2 Fire, Lightning or Transportation					AO \$ INCL
	3 Theft					AO \$ INCL
	4 Windstorm, Hail, Earthquake or Explosion					AO \$
	5 Combined Additional Coverage					AO \$
	6 Collision					AC \$ INCL
7 Towing	AO \$					
FLEET AUTOMATIC <input type="checkbox"/> Yes <input type="checkbox"/> No						
GAR	GARAGE INSURANCE					
	Coverages and Limits as stated in separate declarations					\$ INCL

ENDORSEMENTS MADE PART OF THE POLICY (designated by ☒ or Endorsement number)

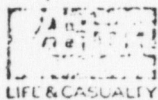
- K ☐ Contractual Liability, CC—  
MP ☐ Premises Medical Payments  
PI ☐ Personal Injury Liability

SEE ENDT.

4. The declarations are completed on the attached General Liability and Automobile Schedules.  
The Automobile Schedule contains a complete list of  
(a) all automobiles and trailers owned by the named insured, and  
(b) all persons within the definition of Class 1 persons, at the effective date of this policy, unless otherwise stated herein.  
The General Liability Schedule discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.
5. During the past three years no insurer has cancelled insurance, issued to the named insured, similar to that afforded hereunder, unless otherwise stated herein.

PAYMENT METHOD	1 Year Policy Total Advance Premium	\$ 250,000.
	Deposit Premium	\$
	3 Year Prepaid Total Adv. Premium	\$
	3 Year Policy Installments	\$
	Total Advance Premium	\$
	Automobile Installments	\$
	Other Installments 1st Anniversary	\$
	2nd Anniversary	\$
"TBD" Means to be Determined		B.T.





## GENERAL PROVISIONS FOR LIABILITY POLICIES

### DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

**"automobile"** means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any machinery or apparatus attached thereto, but does not include mobile equipment;

**"bodily injury"** means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

**"collapse hazard"** includes "structural property damage" as defined herein and property damage to any other property at any time resulting therefrom. "Structural property damage" means the collapse of or structural injury to any building or structure due to (1) grading of land, excavating, borrowing, filling, backfilling, tunneling, pile driving, cofferdam work or caisson work or (2) moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support thereof. The collapse hazard does not include property damage (1) arising out of operations performed for the named insured by independent contractors, or (2) included within the completed operations hazard or the underground property damage hazard, or (3) for which liability is assumed by the insured under an incidental contract;

**"completed operations hazard"** includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed;
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed; or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include bodily injury or property damage arising out of:

- (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof;
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials; or
- (c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations";

**"elevator"** means any hoisting or lowering device to connect floors or landings, whether or not in service, and all appliances thereof including any car, platform, shaft, hoistway, stairway, runway, power equipment and machinery or any hydraulic or mechanical hoist used for raising or lowering automobiles for lubricating and servicing or for dumping material from trucks; but it does not include an automobile servicing hoist, or a hoist without a platform outside a building if without mechanical cover or if not attached to building walls, or a hoist or material hoist used in alteration, construction or demolition operations, or an inclined conveyor used exclusively for carrying property or a dumbwaiter used exclusively for carrying property and having a compartment no greater than six feet.

**"explosion hazard"** includes property damage arising out of blasting or explosion. The explosion hazard does not include property damage (1) arising out of the explosion of air or steam vessels, piping or pressure prime movers, machinery or power transmitting equipment, or (2) arising out of operations performed for the named insured by independent contractors, or (3) included within the completed operations hazard or the underground property damage hazard, or (4) for which liability is assumed by

the insured under an incidental contract;

**"incidental contract"** means any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition operations on or adjacent to a railroad, (3) contract for indemnity, a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, or (5) elevator maintenance agreement;

**"insured"** means any person or organization qualifying as an insured in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability;

**"mobile equipment"** means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or (3) designed for use principally on public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills, concrete mixers (other than the mix-in-transit type), graders, scrapers, rollers and other road construction or repair equipment, air-compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment;

**"named insured"** means the person or organization named in item 1, of the declarations of this policy;

**"named insured's products"** means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but "named insured's products" shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;

**"occurrence"** means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

**"policy territory"** means:

- (1) the United States of America, its territories or possessions, or Canada; or
- (2) international waters or air space, provided the bodily injury or property damage does not occur in the course of travel or transportation to or from any other country, state or nation; or
- (3) anywhere in the world with respect to damages because of bodily injury or property damage arising out of a product which was sold for use or consumption within the territory described in paragraph (1) above, provided the original suit for such damages is brought within such territory;

**"products hazard"** includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

**"property damage"** means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period;

**"underground property damage hazard"** includes underground property damage as defined herein and property damage to any other property at any time resulting therefrom. "Underground property damage" means property damage to wires, conduits, pipes, mains, sewers, tanks, tunnels, any other property and any apparatus in connection therewith, be it on the surface of the ground or under, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, backfilling or pile driving. The underground property damage hazard does not include property damage (1) arising out of operations performed for the named insured by independent contractors, or (2) included within the completed operations hazard, or (3) for which liability is assumed by the insured under an incidental contract.

## SUPPLEMENTARY PAYMENTS

The company will pay, in addition to the applicable limit of liability,

- (a) all expenses incurred by the company, all costs taxed against the insured in any suit brought by the company and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;
- (b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this

policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but the company shall have no obligation to apply for or furnish any such bonds.

- (c) expenses incurred by the insured for first aid to others at the time of an accident, for bodily injury to which this policy applies;
- (d) reasonable expenses incurred by the insured at the company's request in assisting the company in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed \$25 per day.

NUCLEAR ENERGY LIABILITY EXCLUSION  
(Broad Form)

## I. This policy does not apply

## A. Under any Liability Coverage, to bodily injury or property damage

- (1) with respect to which the insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination or exhaustion of its limit of liability; or
- (2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954 or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

## B. Under any Medical Payments Coverage, or under any Supplementary Payments provision relating to first aid, to expenses incurred with respect to bodily injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility, by any person or organization.

## C. Under any Liability Coverage, to bodily injury or property damage resulting from the hazardous properties of nuclear material, if

- (1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (b) has been discharged or dispersed therefrom;
- (2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or
- (3) the bodily injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such

nuclear facility and any property thereat.

## II. As used herein:

"hazardous properties" include radioactive, toxic or explosive properties.

"nuclear material" means source material, special nuclear material or byproduct material;

"source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof.

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or refining spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 255 grams of plutonium or uranium 233 or any combination thereof or more than 255 grams of uranium 235,

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction, to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property.

## CONDITIONS

## 1. Premium

All premiums for this policy shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

Premium designated in this policy as "advance premium" is a deposit premium only which shall be credited to the amount of the earned premium due at the end of the policy period. At the close of each period (or part thereof terminating with the end of the policy period) designated in the declarations as the audit period the earned premium shall be computed for such period and, upon notice thereof to the named insured, shall become due and payable. If the total earned premium for the policy period is less than the premium previously paid, the company shall return to the named insured the unearned portion paid by the named insured.

The named insured shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

## 2. Inspection and Audit

The company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The company may examine and audit the named insured's books and records at any time during the policy period and extensions thereof, and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

## 3. Financial Responsibility Laws

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The insured agrees to rein-



first, the company for any payment made by the company which it would not have been obligated to make under the terms of this policy, except for the agreement contained in this paragraph.

#### 4. Insured's Duties in the Event of Occurrence, Claim or Suit

- In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of all persons who sustained or claim to be injured by the insured, shall be given to the company or any of its authorized agents as soon as practicable.
- If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
- The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in asserting any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy, and the insured shall attend hearings and trials, attend in securing and giving evidence and costs, and the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

#### 5. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured under actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability; nor shall the company be implicated by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

#### 6. Other Insurance

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below.

- Contribution by Equal Shares.** If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so

paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its full or the full amount of the loss is paid.

- Contribution by Limits.** If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

#### 7. Subrogation

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

#### 8. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or entitle the company from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

#### 9. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon. If, however, the named insured shall be such insurance as is afforded by this policy shall apply (1) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such, and (2) with respect to the property of the named insured, to the person having proper temporary custody thereof, as insured, but only until the appointment and qualification of the legal representative.

#### 10. Three Year Policy

If this policy is issued for a period of three years, any limit of the company's liability stated in this policy as "aggregate" shall apply separately to each consecutive annual period thereof.

#### 11. Cancellation

This policy may be cancelled by the named insured by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

#### 12. Declarations

By acceptance of this policy, the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The Aetna Casualty and Surety Company has caused this policy to be signed by its President and a Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the Company.

*Howard A. Moore*  
Secretary

*Donald M. Johnson*  
President

[illegible]

"non-owned automobile" means an automobile which is neither an owned automobile nor a hired automobile;

"owned automobile" means an automobile owned by the named insured;

"private passenger automobile" means a four wheel passenger or station wagon type automobile;

"trailer" includes a semi-trailer but does not include mobile equipment.

## VI. ADDITIONAL CONDITION

2000-2001—Hired and Non-Owned Automobiles

With respect to the insurability of a non-owned automobile, the insurance shall be determined by the policy or policies and collectible insurance available to the insured.

## COMPREHENSIVE GENERAL LIABILITY INSURANCE

**I. BODILY INJURY LIABILITY COVERAGE**  
**PROPERTY DAMAGE LIABILITY COVERAGE**

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

☐ Bodily injury or  
☐ property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured, seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by the payment of judgments or settlements.

### Exclusions

**This insurance does not apply:**

- (a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;
- (b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:
- (1) any automobile or a craft owned or operated by or rented or loaned to any insured; or
  - (2) any other automobile or aircraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobile is not owned by or rented or loaned to any insured:

- (c) to bodily injury or property damage arising out of (1) the ownership, maintenance, operation, use, loading or unloading of any mobile equipment while being used in any prearranged or organized racing, speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity or (2) the operation or use of any snowmobile or trailer designed for use thereon;
- (d) to bodily injury or property damage arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to any Insured;
- (e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
- (1) any watercraft owned or operated by or rented or loaned to any Insured, or
  - (2) any other watercraft operated by any person in the course of his employment by any Insured;

but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured:

- (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;
- (g) to bodily injury or property damage due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing, with respect to
- (1) liability assumed by the Insured under an incidental contract, or

- (2) expenses for first aid under the Supplementary Payments provision,
- (h) to bodily injury or property damage for which the insured or his indemnitor may be held liable
  - (1) as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or
  - (2) if not so engaged, as an owner or lessor of premises used for such purposes.

if such liability is imposed

- (i) by, or because of the violation of, any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage; or
- (ii) by reason of the selling, serving or giving of any alcoholic beverage to a minor or to a person under the influence of alcohol or which causes or contributes to the intoxication of any person;

but part (ii) of this exclusion does not apply with respect to liability of the insured or his indemnitee as an owner or lessor described in (2) above.

- (i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment, compensation or disability benefits law, or under any similar law;
- (j) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured, or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract;
- (k) to property damage to
  - (1) property owned or occupied by or rented to the insured,
  - (2) property used by the insured, or
  - (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control;

but parts (2) and (3) of this exclusion do not apply with respect to liability under a written subcontract agreement; and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured;

- (l) to property damage to premises alienated by the named insured arising out of such premises or any part thereof;
- (m) to loss of use of tangible property which has not been physically injured or destroyed resulting from
  - (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or
  - (2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured, after such products or work have been put to use by any person or organization other than an insured;

- (n) to property damage to the named insured's products arising out of such products or any part of such products;
- (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of materials, parts or equipment furnished in connection therewith;
- (p) to damages claimed for the withdrawal, inspection, repair, replacement or loss of use of the named insured's products or work completed by or for the named insured or of any



from and the fact of any known or suspected defect or deficiency therein.

(4) to property damage included within:

- (1) the explosion hazard in connection with operations identified in this policy by a classification code number which includes the symbol "X";
- (2) the collapse hazard in connection with operations identified in this policy by a classification code number which includes the symbol "C";
- (3) the underground property damage hazard in connection with operations identified in this policy by a classification code number which includes the symbol "U".

## II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

- (a) if the named insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor, and the spouse of the named insured with respect to the conduct of such a business;
- (b) if the named insured is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such;
- (c) if the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such;
- (d) any person (other than an employee of the named insured) or organization while acting as real estate manager for the named insured; and
- (e) with respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law:
  - (i) an employee of the named insured while operating any such equipment in the course of his employment; and
  - (ii) any other person while operating with the permission of the named insured any such equipment registered in the name of the named insured and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or organization;

provided that no person or organization shall be an insured under this paragraph (e) with respect to:

- (1) bodily injury to any fellow employee of such person injured in the course of his employment; or
- (2) property damage to property owned by, rented to, in charge of or occupied by the named insured or the employer of any person described in subparagraph (iii).

This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured.

## III. LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) per-

son or persons, or (3) occurrences, the company's liability is limited as follows:

**Bodily Injury and Property Damage Liability Coverage.** The total liability of the company for all damages, including attorney's fees and costs of services, because of bodily injury sustained by one or more persons, or the result of any one occurrence, shall not exceed the limit of bodily injury liability stated in the declarations as applicable to each occurrence.

Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of (1) all bodily injury included within the completed operations hazard and (2) all bodily injury included within the products hazard shall not exceed the limit of bodily injury liability stated in the declarations as aggregate.

**Property Damage Liability Coverage.** The total liability of the company for all damages because of all property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to each occurrence.

Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of (1) property damage to which this coverage applies and described in any of the numbered subparagraphs below shall not exceed the limit of property damage liability stated in the declarations as "aggregate".

- (1) all property damage arising out of premises or operations rated on a remuneration basis or contractor's equipment rated on a receipts basis, including property damage for which liability is assumed under any incidental contract related to such premises or operations, but excluding property damage included in subparagraph (2) below;
- (2) all property damage arising out of and occurring in the course of operations performed for the named insured by independent contractors and general supervision thereof by the named insured, including any such property damage for which liability is assumed under any incidental contract related to such operations, but this subparagraph (2) does not include property damage arising out of maintenance or repairs at premises owned by or rented to the named insured or structural alterations at such premises which do not involve changing the size of or moving buildings or other structures;
- (3) all property damage included within the products hazard and all property damage included within the completed operations hazard.

Such aggregate limit shall apply separately to the property damage described in subparagraphs (1), (2) and (3) above, and under subparagraphs (1) and (2), separately with respect to each project away from premises owned by or rented to the named insured.

**Bodily Injury and Property Damage Liability Coverage.** For the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

## IV. POLICY TERRITORY

This insurance applies only to bodily injury or property damage which occurs within the policy territory.

## AUTOMOBILE MEDICAL PAYMENTS INSURANCE

### I. AUTOMOBILE MEDICAL PAYMENTS COVERAGE

The company will pay the reasonable medical expense incurred within one year from the date of the accident:

**Division 1.** to or for each person who sustains bodily injury, caused by accident, while occupying a designated automobile which is being used by a person in whom bodily injury liability insurance is afforded under this policy with respect to such use.

**Division 2.** to or for each insured who sustains bodily injury, caused by accident, while occupying or, while a pedestrian, through being struck by a highway vehicle.

### Exclusions

This insurance does not apply:

- (a) to bodily injury to any person or insured while employed or otherwise engaged in duties in connection with an automobile business, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

- (b) to bodily injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;

- (c) under Division 1, to bodily injury to any employee of the named insured arising out of and in the course of employment by the named insured, but this exclusion does not apply to any such bodily injury arising out of and in the course of domestic employment by the named insured unless benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

- (d) under Division 2, to bodily injury sustained while occupying a highway vehicle owned by any insured, or furnished for the regular use of any insured, or by any person or organization other than the named insured.

### II. PERSONS INSURED—DIVISION 1

Each of the following is an insured under this insurance to the extent set forth below:

- (a) any person designated as insured in the schedule;
- (b) while residents of the same household as such designated per-

## AMP PART

CGL PART - AMENDED

ALL SUCH DAMAGE ARISING OUT OF ONE LOT OF GOODS OR PRODUCTS PREPARED OR ACQUIRED BY THE NAMED INSURED OR BY ANOTHER TRADING UNDER HIS NAME SHALL BE CONSIDERED AS ARISING OUT OF ONE OCCURRENCE.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement No.

33

BI

FD

In Advance \$	\$
1st Anniv. \$	\$
2nd Anniv. \$	\$



AGENCY/ BROKER	CODE	NAME		COMMISSION	PAYMENT	TAX DISTRICT	TRANSACTION TYPE	LINE OF BUSINESS	CLASS	POLICY EFF. DATE	DATE OF INITIAL
COUNTERSIGNED OFFER	OFFICE CODE	C	JOE							POLICY EXPIRY DATE	
STAT PLAN	ID	TERMINATION STATE RATE	LIMITS OF LIABILITY			DR REC.	FORM OR CLASS	DISC.	PREMIUM	EXPOSURE	
			BI	PD	MED						
											END OF FORM

**GENERAL AND AUTOMOBILE LIABILITY INSURANCE  
DEDUCTIBLE ENDORSEMENT**

IT IS AGREED THAT THE INSURANCE APPLIES SUBJECT TO THE FOLLOWING  
ADDITIONAL PROVISIONS:

1. THE COMPANY'S OBLIGATION UNDER THE BODILY INJURY LIABILITY AND  
PROPERTY DAMAGE COVERAGE TO PAY DAMAGES AND TO PAY EXPENSES INCURRED  
UNDER THE SUPPLEMENTARY PAYMENTS PROVISION (OTHER THAN SALARIES OF  
THE COMPANY'S EMPLOYEES) ON BEHALF OF THE INSURED APPLIES ONLY TO THE  
AMOUNT OF DAMAGES AND SUCH EXPENSES IN EXCESS OF THE DEDUCTIBLE  
AMOUNTS STATED BELOW:

\$ 100,000. EACH OCCURRENCE  
\$ 1,000,000. AGGREGATE BODILY INJURY & PROPERTY DAMAGE

2. THE DEDUCTIBLE AMOUNTS APPLY AS FOLLOWS:

(A) THE DEDUCTIBLE AMOUNT STATED AS APPLICABLE TO "EACH OCCURRENCE"  
APPLIES TO ALL DAMAGES AND EXPENSES INCURRED UNDER THE SUPPLEMENTARY  
PAYMENTS PROVISION (OTHER THAN SALARIES OF THE COMPANY'S EMPLOYEES  
BECAUSE OF ALL BODILY INJURY OR PROPERTY DAMAGE SUSTAINED AS THE  
RESULT OF ANY ONE OCCURRENCE;

(B) THE TOTAL DEDUCTIBLE AMOUNT APPLICABLE TO ALL BODILY INJURY AND  
PROPERTY DAMAGE TO WHICH THIS INSURANCE APPLIES, SHALL NOT EXCEED  
THE DEDUCTIBLE AMOUNT STATED AS APPLICABLE TO "AGGREGATE BODILY  
INJURY AND PROPERTY DAMAGE".

This endorsement is a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

*(The information below is required only when this endorsement is issued subsequent to preparation of policy.)*

Endorsement effective  
Named Insured  
Additional Premium \$

Policy No.  
-CONT.-  
Return Premium \$

Endorsement No.

38 (A)

BI PD

In Advance \$ \$  
1st Anniv. \$ \$  
2nd Anniv. \$ \$

The Aetna Casualty and Surety Company  
The Standard Fire Insurance Company  
Hartford, Connecticut

Countersigned by \_\_\_\_\_  
(Authorized Representative)

[illegible]

## GENERAL & AUTOMOBILE LIABILITY INSURANCE

-CONT.-

3. THE TERMS OF THE POLICY, INCLUDING THOSE WITH RESPECT TO (A) THE COMPANY'S RIGHTS AND DUTIES WITH RESPECT TO THE DEFENSE OF SUITS AND (B) THE INSURED'S DUTIES IN THE EVENT OF AN OCCURRENCE APPLY IRRESPECTIVE OF THE APPLICATION OF THE DEDUCTIBLE AMOUNT.
4. THE COMPANY MAY PAY ANY PART OR ALL OF THE DEDUCTIBLE AMOUNT TO EFFECT SETTLEMENT OF ANY CLAIM OR SUIT AND THE NAMED INSURED SHALL REIMBURSE THE COMPANY FOR SUCH PART OF THE DEDUCTIBLE AMOUNT AS HAS BEEN PAID BY THE COMPANY.
5. THE NAMED INSURED SHALL PAY AN ADDITIONAL PREMIUM, WHICH SHALL BE CHARGED TO THE NAMED INSURED EACH TIME THERE IS REIMBURSEMENT UNDER PARAGRAPH 4. SUCH PREMIUM SHALL BE CALCULATED BY APPLYING THE FOLLOWING FACTOR TO EACH REIMBURSEMENT MADE IN ACCORDANCE WITH PARAGRAPH 4:
6. THE PROVISIONS OF THIS ENDORSEMENT SHALL NOT APPLY TO MEDICAL SCIENCE LABORATORIES INC.

9.2% OF EACH CLAIM.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective  
Named Insured  
Additional Premium \$

Policy No.

Endorsement No.

38 (U)

Return Premium \$

BI

PD

In Advance \$	\$
1st Anniv. \$	\$
2nd Anniv. \$	\$

**The Aetna Casualty and Surety Company**  
**The Standard Fire Insurance Company**  
 Hartford, Connecticut

Countersigned by

(Authorized Representative)

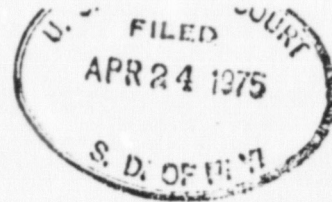
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BOUND FILED

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



----- x

THE HONE INSURANCE COMPANY, :

Plaintiff, :

- against - :

74 Civ. 4164

THE AETNA CASUALTY AND SURETY COM- :  
PANY and DIAMOND SHAMROCK CORPORA- :  
TION, :

Defendants. :

----- x

#42308

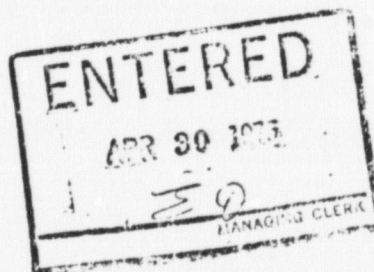
A P P E A R A N C E S:

Messrs. Townley, Updike, Carter & Rodgers  
220 East 42nd Street  
New York, New York 10017  
Attorneys for Plaintiff

J. Robert Morris, Esq.  
111 Fulton Street  
New York, New York 10038  
Attorney for Defendant  
Aetna Casualty & Surety Company

Messrs. Cadwalader, Wickersham & Taft  
One Wall Street  
New York, New York 10005  
Attorneys for Defendant  
Diamond Shamrock Corporation

CARTER, District Judge



O P I N I O N

## I

Plaintiff, the Home Insurance Co. ("Home"), seeks a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202, declaring the extent of its obligation to indemnify its insured, defendant Diamond Shamrock Corporation ("Diamond Shamrock"). Jurisdiction is based on diversity of citizenship. Plaintiff has moved, and both Diamond Shamrock and defendant Aetna Casualty and Surety Company ("Aetna") have cross-moved for summary judgment.

The following facts appear to be undisputed. Diamond Shamrock was insured under two liability policies. The first was a comprehensive liability policy issued by Aetna (the "Aetna Underlying Policy"). This policy insured Diamond Shamrock inter alia against liability for damage to the property of others caused by an occurrence up to \$250,000 per occurrence, subject to a deductible of \$100,000 per occurrence. The number of occurrences for purposes of the policy is dependent on two provisions. The first is the definition of "occurrence":



"'occurrence'" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured; \*\*\* "

The policy was also subject to Endorsement #33 which provided in part:

" \*\*\* as respects products liability for \*\*\* property damage coverage:

"All such damage arising out of one lot of goods or products prepared or acquired by the named insured or by another trading under his name shall be considered as arising out of one occurrence."

The second policy, issued by Home (the "Home Excess Policy"), insured Diamond Shamrock for liability for property damage in excess of that covered by the Aetna Underlying Policy, up to \$3,000,000 per occurrence. <sup>1</sup>

During the period of coverage of the two policies, Diamond Shamrock incurred liability for property damage as a result of a series of events. At its Harrison, New Jersey, plant, Diamond Shamrock produced two lots of

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<sup>1</sup> The term "occurrence" was defined as in the Aetna policy.

superconcentrated vitamin D-3 resin which became "inactive" and thus defective at the Harrison plant. The two Harrison lots were shipped to Diamond Shamrock's Louisville, Kentucky, plant where the defective resin was sprayed on corn cob fractions to produce four lots of "Nopdex 200," a vitamin D-3 livestock food supplement. As a result, each of the four Louisville lots of Nopdex was also defective. Diamond Shamrock sold the four Louisville lots to Central Soya Corporation which used them in making chicken feed. Central Soya sold the chicken feed to numerous chicken farmers throughout the country, and chicken fed with the defective chicken feed developed various afflictions, including rickets, abnormal growth, defective egg production and death. Central Soya has been settling the farmers' claims, and the parties have agreed that Diamond Shamrock is liable to Central Soya to the extent of those claims.

A dispute has arisen between Home and the defendants as to the number of occurrences arising out of these undisputed facts. Home contends that there were four occurrences, one for each of the four Louisville lots of Nopdex. Thus Home seeks a declaration that it is liable under the Home Excess Policy only for settlement contributions in excess of \$250,000 per Louisville lot. Aetna and Diamond Shamrock,



on the other hand, take the position that there were only two occurrences, one for each of the two Harrison lots of superconcentrated vitamin D-3 resin which were the original link in the chain of contaminated feed and resultant damages. Under the construction offered by Aetna and Diamond Shamrock, Home would bear a greater, and Aetna a lesser, share of the total burden of indemnification.

Summary judgment should be granted where the pleadings, depositions, affidavits and admissions filed in the case "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), F.R.Civ.P.; Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). The only issue in this case concerns the proper construction of the Aetna Underlying Policy, and this is a matter of law which may be resolved by the court on summary judgment. Mallad Construction Corp. v. County Federal Savings and Loan Association, 32 N.Y. 2d 285, 291, 344 N.Y.S. 2d 925, 930 (1973). <sup>2</sup>

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<sup>2</sup> Since this is a diversity action, the governing substantive law is that of New York State.

Disposition of the controversy turns on determination of the meaning of "occurrence" as used in the Aetna underlying policy and the limitation on liability provided by Endorsement #33. Plaintiff Home argues that the sole issue is whether the phrase "lot of goods or products prepared \*\*\* by the named insured" in Endorsement #33 refers to the four Louisville lots or the two Harrison lots. It contends that since the policy insures against products liability to third persons, a "common sense" construction leads to the conclusion that the term "goods or products" means commodities such as Nopdex 200 which are sold or otherwise transferred to third parties. If these goods or products are defective, such defects may lead to liability. According to Home, the policy term should not be applied to ingredients such as the two Harrison lots of resin since defects in such ingredients cannot alone give rise to liability.

Diamond Shamrock and Aetna oppose this construction on the ground that the "accidents" constituting the "occurrences" happened at the Harrison plant during the melting and blending of the two Harrison lots of resin. They argue that a lot should be deemed a lot for purposes of Endorsement #33 when it first has separate



integrity, and they note that the Louisville lots were defective only because of the defects in the Harrison lots. They urge that the "lot" clause in Endorsement #33 be construed to mean that there should be deemed to be one occurrence for each lot with respect to which an accident occurred.

## II

Even if it is conceded that Diamond Shamrock's production mistakes at the Harrison plant were the initial causative factors in producing the damage, defendants are clearly in error in arguing that such production mistakes were themselves "occurrences" or "accidents" under the terms of the Aetna policy. In Arthur A. Johnson Corp. v. Indemnity Insurance Co., 7 N.Y. 2d 227, 228-29, 196 N.Y.S 2d 678; 682-83 (1959), the New York Court of Appeals rejected the view that the policy term "accident" referred to an act by the insured, and that the number of "accidents" was dependent on the number of acts by the insured which proximately caused the damages. In Johnson, the insured contractor, while building a subway, removed the underground walls in front of two buildings which had adjoining but separate sub-basements, so constructed that water in the sub-basement of one building would not flow into the sub-basement of the other. The insured

then built two separate walls enclosing the fronts of the two sub-basements. Thereafter, a rainfall of unprecedented intensity flooded the contractor's excavation. One of the temporary underground walls gave way and one of the sub-basements was flooded, causing property damage. Fifty minutes later the wall protecting the other sub-basement was breached, and similar flood damage occurred.

The Court of Appeals held that, for purposes of the policy limitation of \$50,000 per accident, there had been two accidents, rather than one. In arriving at its conclusion, the court considered three approaches. First, as noted, it rejected the view that the number of accidents is equivalent to the number of acts by the defendant which proximately caused the injuries. Second, it refused to hold that each person who has sustained a loss has suffered an accident, or that the number of accidents is determined by the number of persons damaged. Finally, the court held that the term "accident" is to be used "in its common sense of 'an event of an unfortunate character that takes place without one's foresight or expectation \*\*\*.'" (emphasis in original). 7 N.Y. 2d at 228, 196 N.Y.S. 2d at 683.

Applying this test, the court concluded that there had been two events. Significantly, the court stated that in each instance, the "accident" was the



collapse of the wall, not the defendant's negligent act in constructing the wall which was the proximate cause of the damage. 7 N.Y. 2d at 230, 196 N.Y.S. 2d at 684. In reaching the conclusion that there had been two accidents, rather than one, the court relied on two factors: (1) the collapse of one wall was distinguishable in time and space from the collapse of the other; and (2) the collapse of one wall did not cause the collapse of the other.

Applying Johnson to the instant case, it is clear that the "accidents" and hence the "occurrences" <sup>3</sup> were not Diamond Shamrock's acts in manufacturing the

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<sup>3</sup> Defendants have argued that the substitution of the term "occurrence" for "accident" in the standard policy in 1966 was intended in some fashion to obviate the need for the limitation imposed by the "lot" clause of Endorsement #33. However, the New York Court of Appeals, in Hartford Accident & Indemnity Co. v. Wesolowski, 33 N.Y. 2d 169, 173 n.\*, 350 N.Y.S. 2d 895, 899 n.1 (1973), stated that for purposes of that case, there was no difference in the meaning of the two terms.

defective resin, even if these acts were the proximate cause of the damage.<sup>4</sup> Rather, the "accidents" appear to be events in the causal chain which immediately preceded or occurred simultaneously with the damage. In Johnson the accidents were the collapse of the walls; in the instant case, the accidents were the feeding of the chickens with the defective chicken feed or their ingestion of the poison.

Consequently, defendants' argument that the relevant lots are the two Harrison lots merely because the "accidents" occurred with respect to those lots must be rejected. On the contrary, the accidents occurred after the four Louisville lots of Nopdex had been manufactured and sold to Central Soya for further processing.

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<sup>4</sup> Insofar as any significance can be attributed to the use of "occurrence" rather than "accident", it supports the view taken here. In Hartford Accident & Indemnity Co. v. Wesolowski, supra n.3, 33 N.Y. 2d at 173 n.\*, 350 N.Y.S. 2d at 899 n.1, the Court of Appeals stated that use of the term "accident" "suggests a connotation as to causation," while "occurrence" is "more objectively descriptive of what occurred rather than being in any way related to how or why." According to this view, retention of the term "accident" in the policy after 1966 might have given some support to defendants' position that events at the Harrison plant constituting the proximate cause of the damage were the "accidents." Substitution of the term "occurrence" may indicate that the parties intended to refer to events occurring just prior to or simultaneously with the damage.



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Applying the two tests of Johnson to determine what events were the "occurrences" in this case and how many occurrences there were,<sup>5</sup> it would probably not be correct to find that there was one accident or occurrence for each chicken that was poisoned. Each farmer probably fed all of his chickens, or many chickens at a single time and place. Under the Johnson tests, each feeding and ingestion of poison by the several chickens of one farmer constituted a single accident to the extent that it occurred at a single time and place, and neither caused, nor was caused by any other feeding. It is undisputed that the defective chicken feed was sold to "numerous chicken farmers throughout the country, who suffered property damage." (Affidavit of Robert H. Burns, sworn to October 21, 1974, ¶5(f)). Thus it may be inferred that there were numerous "accidents" or "occurrences," and that in the absence of the "lot" clause limitation, Aetna would have been liable for up to \$250,000 for each such occurrence.

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This analysis again does not take into account the limitation of the "lot" clause in Endorsement #33.

The remaining problem is to determine how Aetna's liability is affected by the provision that "all \*\*\* damage arising out of one lot of goods or products prepared \*\*\* by the named insured \*\*\* shall be considered as arising out of one occurrence." The terms of an insurance policy are to be construed according to the understanding of an average business man.

Thomas J. Lippon, Inc. v. Liberty Mutual Insurance Co., 34 N.Y. 2d 356, 361, 357 N.Y.S. 2d 705, 708 (1974); Tyroler v. Continental Casualty Co., 31 A.D. 2d 8, 10, 294 N.Y.S. 2d 373, 375 (First Dep't 1968). I agree with Home that a "common sense" construction clearly supports the conclusion that the term "goods or products" refers to the goods which Diamond Shamrock sells to third persons, and which, if defective, give rise to liability. Accordingly, I find that Home is entitled to summary judgment declaring that the "lots" referred to in Endorsement #33 were the four Louisville lots of Nopdex and that the damage in this case arose out of four occurrences.

If the parties had intended Endorsement #33 to refer to accidents arising from ingredients as defendants argue, they would surely have used more apt terms such as "intermediate products" or "ingredients."



However, the inclusion of "ingredients" would probably never have occurred to the parties since an "accident" could occur for purposes of the policy only after the ingredients were made into final goods and products which had been transferred to third persons. <sup>6</sup> It is only defendants' erroneous construction of the term "occurrence" that attaches particular significance to events early in the production process. <sup>7</sup>

The extrinsic evidence offered by defendants as to the mutual intent of Diamond Shamrock and Aetna does not preclude me from granting Home's motion. Defendants' affidavits state that because the Aetna policy was retrospectively rated, while the Home Excess Policy was not, Diamond Shamrock agreed with Aetna that the "lot" clause would be construed to produce

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<sup>6</sup> The definition of "products hazard" in the policy supports this view:

"products hazard includes \*\*\* property damage arising out of the named insured's products \*\*\* but only if the \*\*\* property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others; \*\*\* "

<sup>7</sup> Defendants state that resin made at Harrison is sometimes sold to third persons. That fact is not significant since the defective resin here was clearly an ingredient which did not meet the definition of "goods or products," as I have construed it here.

the fewest lots possible and hence minimize Aetna's liability. In this connection, defendant states that the parties agreed that the lot clause should refer to the earliest identifiable lot in the production process. However, since defendants have not shown that this alleged mutual intent was expressed by the parties in words or actions, it cannot be considered in construing the policy. Sperling v. Great American Indemnity Co., 7 N.Y. 2d 442, 450, 199 N.Y.S. 2d 465, 472 (1960). Moreover, since conclusory statements of intent do not raise an issue of fact, they do not bar the court from granting summary judgment. Mallad Construction Corp. v. County Federal and Loan Association, supra, 32 N.Y. 2d at 290, 344 N.Y.S. 2d at 930.

The statements in defendants' affidavit as to the general understanding and custom in the insurance industry in respect of the meaning of the "lot" clause must also be excluded from consideration. None of defendants' affidavits states facts sufficient to show that the affiant is qualified to testify as to insurance industry custom and practice. The affidavits contain conclusory statements as to the "general understanding" of the industry and the "purpose of the draftsmen which are not supported by specific evidentiary facts. Since these statements would not survive

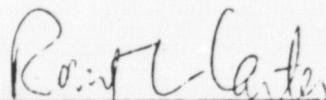


objection if made in court from the witness stand, Rule 56(e) bars the court from considering them on a motion for summary judgment. Applegate v. Top Associates, Inc., 425 F. 2d 92, 96-7 (2d Cir. 1970); Union Insurance Society of Canton, Ltd. v. William Gluckin & Co., Inc., 353 F. 2d 946, 952-53 (2d Cir. 1965).

In conclusion, defendants' motions are denied, and plaintiff is entitled to summary judgment declaring that for purposes of Endorsement #33 of the Aetna Underlying Policy, the property damage in this case arose from the four Louisville lots of Nopdex, and that there were four occurrences in this case. Therefore, Aetna is liable for up to \$250,000 for each of four occurrences, subject to the deductibles. Home is liable under the Excess Policy only for settlement payments in excess of the amounts for which Aetna is liable under the Underlying Policy as construed in this opinion.

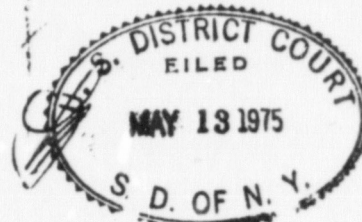
SO ORDERED.

Dated: New York, New York  
April 24, 1975



ROBERT L. CARTER  
U.S.D.J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
THE HOME INSURANCE COMPANY,

Plaintiff,

74 Civ. 4164 (RLC)

-against-

JUDGMENT

AETNA CASUALTY & SURETY COMPANY  
and DIAMOND SHAMROCK CORPORATION,

Defendants.  
-----x

This action came on for hearing before the Court,  
Hon. Robert L. Carter, District Judge, presiding, and the  
issues having been duly heard and a decision having been duly  
rendered,

IT IS ORDER AND ADJUDGED

that the liability of plaintiff, The Home Insurance  
Company, under its policy of insurance No. HEC 4165987 with  
respect to settlement payments made by or on behalf of defendant  
Diamond Shamrock Corporation resulting from defects in Lots of  
NOPDEX 200 numbered 7356, 7436, 7466 and 7589 which were pre-  
pared by defendant Diamond Shamrock Corporation at its Louis-  
ville, Kentucky plant, sold to Central Soya Corporation and  
became the subject of complaints in early 1974 is declared as  
follows:

1. For purposes of Endorsement No. 33 to defen-  
dant The Aetna Casualty & Surety Company's policy

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No. 01AL242750 SCA and the "limits of liability" provisions and declarations of said policy, there were four "occurrences" and the damages arising out of each of the aforesaid four lots arose out of one "occurrence."

2. As to each of the aforesaid four lots, plaintiff The Home Insurance Company is liable under its policy No. HEC 4155987:

(a) only for settlement payments made as a result of defects in such lot that exceed \$250,000.00; and

(b) for no more than \$3,000,000.00.

Plaintiff The Home Insurance Company shall recover of defendants Aetna Casualty & Surety Company and Diamond Shamrock Corporation its costs of action.

Approved as to form.

Dated: New York, New York  
May 9<sup>th</sup>, 1975

Robert L. Carter  
District Judge

Dated at New York, New York this 13<sup>th</sup> day of May,

1975.

Raymond J. Burghardt  
Clerk of the Court

137a

SOUTHERN DISTRICT OF NEW YORK

THE HOME INSURANCE COMPANY,

Plaintiff,

-against-

AETNA CASUALTY & SURETY COMPANY and  
DIAMOND SHAMROCK CORPORATION,

Defendants.

NOTICE OF APPEAL  
74 Civ. 4164 (RLC)

S I R S :

NOTICE is hereby given that Aetna Casualty & Surety Company, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on the 13th day of May, 1975.

Dated, New York, N.Y. June 10, 1975

*J. Robert Morris*  
J. ROBERT MORRIS  
Attorney for Defendant  
Aetna Casualty & Surety Company  
111 Fulton Street  
New York, N.Y. 10038

766-2528

TO: TOWNLEY, UPDIKE, CARTER & RODGERS, ESQS.  
Attorneys for Plaintiff  
220 East 42nd Street  
New York, N.Y. 10017

CADWALADER, WICKERSHAW & TAFT, ESQS.  
Attorneys for Defendant  
DIAMOND SHAMROCK CORP.  
One Wall Street  
New York, N.Y. 10005

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

THE HOME INSURANCE COMPANY, : 74 Civ. 4164 (RLC)

Plaintiff, :

-against- : NOTICE OF APPEAL

THE AETNA CASUALTY and SURETY :  
COMPANY and DIAMOND SHAMROCK :  
CORPORATION, :

Defendants. :

----- x

Notice is hereby given that DIAMOND SHAMROCK CORPORATION, a defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 13th day of May, 1975.

Dated: June 10, 1975  
New York, New York

CADWALADER, WICKERSHAM & TAFT

By

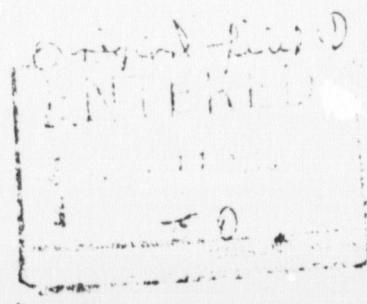
*[Signature]*

A Member of the Firm

One Wall Street  
New York, New York 10005  
Tel: 212-785-1000  
Attorneys for Defendant Diamond  
Shamrock Corporation

TO: TOWNLEY, UPDIKE, CARTER & RODGERS  
Attorneys for Plaintiff The  
Home Insurance Company  
220 East 42nd Street  
New York, New York 10017

J. ROBERT MORRIS, ESQ.  
Attorney for Defendant The Aetna  
Casualty and Surety Company  
111 Fulton Street  
New York, New York 10038



CHAS. H. BROWN  
ATTORNEY AT LAW  
CINCINNATI, OHIO  
ATTY'S FOR Home  
Insurance Co.

Carl Bowen

8/28/75

9:30am

Copy Received 8/28/75  
10:55 AM  
J. Robert Morris  
attly for Aetna Genl  
as Smith company